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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 91.

FRED H. KOLZE, ADMINISTRATOR OF THE ESTATE OF FRIEDERICH KOLZE, DECEASED; LINA KOLZE, LOUISA KOLZE, ET AL., APPELLANTS,

vs.

CHARLOTTE E. HOADLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 2, 1904.

(19,463.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 8, 1905.

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1 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

CHARLOTTE E. HOADLEY, Complainant, *vs.* ABRAHAM L. DAY, CHARLES E. STADE, as Trustee; Frank Stade, as Successor in Trust; Louisa Kolze, a Spinster; Fred H. Kolze, as Administrator of the Estate of Friedrich Kolze, Deceased; Percy V. Castle, as Trustee, and Arista B. Williams, as Successor in Trust, and Lina Kolze, a Widow, Defendants.	In Chancery. 25192.

Mr. Herman W. Stillman, solicitor for Charlotte E. Hoadley.
Mr. Percy V. Castle, Mr. Arista B. Williams, Mr. Ben M. Smith, solicitors for Fred H. Kolze, adm'r, etc., Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams as successor in trust.

2 Pleas in the circuit court of the United States for the northern district of Illinois—northern division, in chancery sitting at the United States court room, in the city of Chicago, in said district and division, before the Honorable Christian C. Kohlsaat, district judge of the United States for said northern district of Illinois, on Wednesday, the twenty-fifth day of May, in the year of our Lord, one thousand nine hundred and four, being one of the days of the regular December term of said court, 1903, and of our Independence the one hundred and twenty-eighth year.

MARSHALL E. SAMPSELL, Clerk.

3 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

CHARLOTTE E. HOADLEY, Complainant, *vs.* ABRAHAM L. DAY, CHARLES E. STADE, as Trustee; Frank Stade, as Successor in Trust; Louisa Kolze, a Spinster; Fred H. Kolze, as Administrator of the Estate of Friedrich Kolze, Deceased; Percy V. Castle, as Trustee, and Arista B. Williams, as Successor in Trust, and Lina Kolze, a Widow, Defendants.	In Chancery. 25192.

Be it remembered that on this day to-wit: the twentieth day of November, 1903, came Charlotte E. Hoadley, the complainant in

the above entitled cause by her solicitors Messrs. Stillman and Martyn and Mr. Edwin M. Ashcraft as counsel and by leave of court first had and obtained filed in the clerk's office of said court her certain amended bill of complaint in words and figures following to-wit:

4 Amended Bill.

UNITED STATES OF AMERICA, Northern District of Illinois, } ss:

In the United States Circuit Court, Northern District, Northern Division.

CHARLOTTE E. HOADLEY, Complainant,
vs.
ABRAHAM L. DAY, CHARLES E. STADE, as Trustee; FRANK STADE, as Successor in Trust; Louisa Kolze, a Spinster; Fred H. Kolze, as Administrator of the Estate of Friedrich Kolze, Deceased; Percy V. Castle, as Trustee, and Arista B. Williams, as Successor in Trust, and Lina Kolze, a Widow, Defendants.

To the honorable the judges of said court, in chancery sitting:

And now comes Charlotte E. Hoadley, the complainant in the above entitled cause, by Stillman & Martyn, her solicitors, and by Edwin M. Ashcraft of counsel for said complainant and files this her amended bill in said cause, by leave of court first had and obtained, in words and figures following to-wit:

Your oratrix, Charlotte E. Hoadley, a citizen of the city of Boston, in the State of Massachusetts, brings this her bill of complaint against Abraham L. Day, Charles E. Stade, as trustee, Frank Stade, as successor in trust, Fred H. Kolze, administrator of the estate of
4½ Friedrich Kolze, deceased, Lina Kolze, widow of Friedrich Kolze, deceased, Louisa Kolze, a spinster, Percy V. Castle, as trustee and Arista B. Williams, as successor in trust, all of whom are citizens of the county of Cook, in the State of Illinois,

Humbly complaining, your oratrix respectfully represents unto your honors, that on, to-wit: the 15th day of November, A. D. 1897, one Friedrich Kolze, a resident of said county of Cook, and State of Illinois, was the owner of all of the premises hereinafter described, and other property situated in the said county of Cook and State of Illinois, and that while he was such owner, on, to-wit: the date aforesaid, the said Friedrich Kolze and Lina Kolze, his wife, sold and conveyed the said premises hereinafter described, and other property, to the defendant Abraham L. Day, at a stated consideration of forty five thousand dollars ($45,000.) by general warranty deed, dated and acknowledged on, to-wit: said 15th day of November A. D. 1897 and recorded in the recorder's office of Cook county on the 23rd day of

November, A. D. 1897, in Book 6185 of Records on page 584; your oratrix further shows that as part consideration for said conveyance the said Friedrich Kolze was to receive the sum of one thousand dollars of which sum your oratrix shows that the sum of seven hundred and sixty dollars was in fact paid to and was retained by the said Friedrich Kolze; and your oratrix shows that to secure payment of the deferred portions of the consideration for said premises, notes and trust deeds were executed by the said Abraham L. Day, which trust deeds conveyed various parts of the premises so sold and conveyed for the part of the deferred purchase money chargeable against such various parts thereof, respectively; and your oratrix shows that to secure payment of the sum of fifty-four hun-
5 dred dollars ($5400), being part of the purchase money for the premises hereinafter described, said premises being part of the premises described in the said warranty deed above referred to, the said Abraham L. Day made, executed and delivered, his nine principal promissory notes, dated November 17th, A. D. 1897, payable to the order of himself and by him duly endorsed, for the principal sum of six hundred dollars ($600.) each, three of said notes being due and payable in one year, three of said notes being due and payable in two years and three of said notes being due and payable in three years, from the date thereof respectively, with interest thereon at six per cent. per annum, payable annually before maturity, and to bear interest at the rate of seven per cent. per annum, after maturity, said notes being numbered 16, 17, 18, 19, 20, 21, 31, 32 and 33, respectively, as by said notes ready to be produced upon the hearing thereof, and by copies thereof hereto attached, marked Exhibits "A" "B," "C," "D," "E," "F," "G," "H" and "I," respectively, will more fully appear.

Your oratrix further represents that to secure the payment of the principal sums and interest thereon, evidenced by said three notes numbered 31, 32 and 33, respectively, and disbursements as herein after stated, the said Abraham L. Day, a bachelor, made, executed and delivered a certain deed of trust of even date with said promissory notes, and thereby conveyed to the defendant, Charles E. Stade, as trustee, the following described real estate, situated in the county of Cook and State of Illinois, to-wit:

6 Lots twenty-five (25) to forty-eight (48) both inclusive, in block seven (7) in B. L. Lee's addition to Fairview, said addition being a subdivision of the south half (½) of the northeast quarter (¼) of the south west quarter (¼) and the south east quarter (¼) of the south west quarter (¼) of section nine (9) township forty (40) north, range twelve (12) east of the third principal meridian, map whereof is recorded in the recorder's office of said Cook county, as Document 1,656,444, in Book 53 of Plats, page 36, subject, however, to a condition of defeasance upon the payment of the principal sum and interest secured thereby as aforesaid, and all expenses under said trust deed, according to the provisions thereof; which said deed of trust was duly acknowledged and afterwards, to-wit: on the 24th

day of November, A. D. 1897, was recorded in the recorder's office of Cook county, aforesaid, in Book 5367 of Records, at page 98, as by said instrument, and its accompanying certificates of acknowledgment and recording, ready to be produced upon the hearing of this cause, and by a copy thereof hereto attached, marked Exhibit "J," and made a part hereof, will more fully appear.

Your oratrix further represents that to secure the payment of the principal sums and interest thereon evidenced by said promissory notes numbered 19, 20 and 21, respectively and disbursements as hereinafter stated, the said Abraham L. Day, made, executed and delivered a certain other deed of trust, of even date with said promissory notes, and thereby conveyed to the defendant, Charles E. Stade, as trustee, the following described real estate, situated in the county of Cook and State of Illinois, to-wit: Lots twenty-five (25) to forty-eight (48) both inclusive, in block five (5) in B. L. Lee's
7 addition to Fairview, said addition being a subdivision of the south half ($\frac{1}{2}$) of the north east quarter ($\frac{1}{4}$) of the south west quarter ($\frac{1}{4}$) and the south east quarter ($\frac{1}{4}$) of the south west quarter ($\frac{1}{4}$) of section 9, township forty (40) north, range twelve (12) east of the third principal meridian, map whereof is recorded in the recorder's office of said Cook county, as Document 1,656,444, in Book 53 of Plats, page 36, subject, however, to a condition of defeasance upon the payment of the principal sums and interest secured thereby, as aforesaid, and all expenses under said trust deed, according to the provisions thereof, which said deed of trust was duly acknowledged, and afterwards, to-wit: on the 24th day of November, A. D. 1897, was recorded in the recorder's office of Cook county, aforesaid, in Book 5367 of Records, at page 94, as by said instrument and its accompanying certificates of acknowledgment and recording, ready to be produced upon the hearing of this cause and by a copy thereof hereto attached, marked Exhibit "K" and made a part hereof, will more fully appear.

Your oratrix further represents that to secure the payment of the principal sums and interest thereon evidenced by said promissory notes numbered 16, 17 and 18, respectively, and disbursements as hereinafter stated, the said Abraham L. Day, a bachelor, made, executed and delivered his certain other deed of trust of even date with said principal promissory notes, and thereby conveyed to the defendant, Charles E. Stade, as trustee, the following described real estate, situated in the county of Cook and State of Illinois, to-wit:

8 Lots one (1) to twenty four (24) both inclusive, in block five (5) in B. L. Lee's addition to Fairview, said addition being a subdivision of the south half ($\frac{1}{2}$) of the north east quarter ($\frac{1}{4}$) of the south west quarter ($\frac{1}{4}$) and south east quarter ($\frac{1}{4}$) of the south west quarter ($\frac{1}{4}$) of section nine (9) township forty (40), north, range twelve (12) east of the third principal meridian, map whereof is recorded in the recorder's office of said Cook county, as document 1,656,444 in Book 53 of Plats, at page 36, subject, however, to a con-

dition of defeasance, upon the payment of the principal sums and interest secured thereby, evidenced by said three notes, numbered 16, 17 and 18, respectively, as aforesaid, and all expenses under said trust deed according to the provisions thereof, which said trust deed was duly acknowledged and afterwards, to-wit: on the 24th day of November A. D. 1897, and afterwards recorded in the recorder's office of Cook county aforesaid, in Book 5367 of Records, at page 93, as by said instrument and its accompanying receipts of acknowledgment and recording, ready to be produced upon the hearing of this cause, and by a copy thereof hereto attached marked Exhibit "L" and made a part hereof, will more fully appear.

Your oratrix further represents and shows that it is provided in and by each of said trust deeds hereinbefore referred to, and described, that if default be made in the payment of the said several promissory notes, secured by said trust deed respectively, or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner therein specified for the payment thereof, or in case of waste, or non payment of taxes or assessments on said
9 premises, or of a breach of any of the covenants or agreements therein contained, then in such case, the whole of said principal sum and interest, secured by the said several promissory notes under each trust deed respectively, shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable; and on the application of the legal holder of said promissory notes, or either of them, secured by said trust deeds respectively, it should be lawful for the said grantee in said respective trust deeds, or his successor in trust, to enter into and upon and take possession of the premises, granted by said trust deed as to which default should be made as aforesaid, or any part thereof, then to collect and receive all rents, issues and profits thereof, and in his own name or otherwise, to file a bill or bills in any court having jurisdiction thereof, against the said party of the first part, his heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises, so respectively conveyed for the purpose therein specified by said party of the second part, as such trustee, or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertisement, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person, who may be appointed to execute said trust, and one hundred dollars ($100.00) attorneys' and solicitors' fees, and also all other expenses of said trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at six per cent. per annum, then to pay the principal of said promissory notes, secured by any
10 either or all of said trust deeds so foreclosed, whether due and payable by the terms thereof or at the option of the legal holder thereof, and interest due on said notes, up to the time of such sale, rendering the overplus, if any, unto the said party of the first

part, his legal representatives or assigns on reasonable request, and to pay any rents that may be collected, after such sale and before the time of redemption expires of the purchaser or purchasers of said premises at such sale, or sales, and it shall not be the duty of the purchaser to see to the application of the purchase money.

Your oratrix further represents that the said sale and conveyance by the said Friedrich Kolze and wife, to the said Abraham L. Day, hereinbefore referred to, was negotiated by the defendant Charles E. Stade, who is a nephew, or otherwise related to the said Friedrich Kolze, and your oratrix shows that the said Friedrich Kolze at the date of said sale, and for a long time subsequently thereto, to-wit: until October, A. D. 1898, had great confidence in the said Charles E. Stade, and trusted him implicitly in and about the transaction aforesaid, and hereinafter set forth.

Your oratrix further represents and shows unto your honor that after the recording of said warranty deed from the said Friedrich Kolze and Lina Kolze, his wife, to the said Abraham L. Day, and the execution of said nine promissory notes and said three trust deeds hereinbefore described, the said Friedrich Kolze was then the owner of said nine promissory notes and three trust deeds, together with other notes and trust deeds, securing the same, executed for part of the purchase money of other parts of the premises so
11 conveyed to the said Abraham L. Day, as aforesaid, and being such owner the said Friedrich Kolze entrusted said nine promissory notes, now held and owned by your oratrix, executed by the said Abraham L. Day, and by him endorsed in blank, and being therefore negotiable by delivery, together with said trust deeds, now owned by your oratrix, to the said Charles E. Stade, his trusted agent in the premises, for safe keeping; and your oratrix shows that while the same were in the custody and keeping of the said Charles E. Stade, as the agent of the said Friedrich Kolze, but with all the indicia of ownership of the said securities, your oratrix, on or about the 17th day of February, A. D. 1898, advanced or secured to be advanced a large sum of money upon the note of the said Charles E. Stade secured to be paid by the pledge of the said nine principal notes and three trust deeds as collateral security therefor, and the said nine promissory notes and three trust deeds were then and there deposited by the said Charles E. Stade as such collateral security, and were relied upon by your oratrix as security for the sum of money advanced or secured to be advanced by your oratrix, as aforesaid; and your oratrix shows that the note of the said Charles E. Stade, to secure which the said nine promissory notes and three trust deeds were deposited, as aforesaid, was not paid in whole or in part, and said nine promissory notes and three trust deeds were thereafter sold, in accordance with the terms of the said collateral note, and were bid in and became and now are the property of your oratrix, and your oratrix is now the legal owner and holder thereof.

Your oratrix further represents and shows unto your honors that

after making of said three trust deeds, on to-wit: the 23rd
12 day of November, A. D. 1897, by deed dated and acknowledged on said date and delivered on to-wit: the 30th day of June, A. D. 1898, and recorded in the recorder's office of Cook county, Illinois, on said 30th day of June, A. D. 1898, the said Abraham L. Day, a bachelor, reconveyed the premises embraced in said three deeds, together with other property, to the defendant Friedrich Kolze, from whom the said Abraham L. Day derived title to *said premises, as aforesaid*; and your oratrix further shows that thereafter by a release deed, dated and acknowledged on, to-wit: on the 27th day of October, A. D. 1898, and recorded on, to-wit: October 29th, A. D. 1898, in Cook county, aforesaid, as document 2,747,678, in Book 6363 of records, at page 364, the said Charles E. Stade, trustee, did fraudulently and wrongfully release the three trust deeds hereinbefore described, together with other trust deeds covering other property, unto the said Friedrich Kolze, the said release deed, reciting that the same was made for and in consideration of one dollar, and for other good and valuable considerations, the receipt whereof is thereby confessed, and your oratrix shows in this behalf, that the indebtedness described in said three trust deeds and evidenced by the said nine notes, so owned by your oratrix, as aforesaid, had not and has not been paid, in whole or any part, and said notes had not, and have not, been canceled, and the said release deed, so executed by the said Charles E. Stade, trustee was and is fraudulent, and was made without payment or cancellation of said notes, or any of them, or the cancellation of said three trust deeds, and should be decreed to be void and of no effect, as against your
oratrix, as the owner and holder of said notes, secured by
13 said three trust deeds as aforesaid, and of said three trust deeds, and the said release deed should be set aside, and the said three trust deeds declared to be valid liens upon the said premises, by them conveyed respectively, according to the terms and tenor thereof; and your oratrix shows that the said fraudulent release deed released of record all of said three trust deeds aggregating fifty four hundred dollars ($5400) as aforesaid; and that unless said release deed shall be set aside, the amount of said securities will be lost to your oratrix.

Your oratrix further represents that at or about the time of the execution of and delivery of the said release deed, by the said Charles E. Stade, trustee, dated on, to-wit the 29th day of October, A. D. 1898, the said Friedrich Kolze, now deceased, and the defendant Lina Kolze, his wife, made, executed and delivered, their certain warranty deed of the said premises, conveyed in said three trust deeds aforesaid, and other property, to the defendant Louisa Kolze, who is a daughter of the said grantors, at an expressed consideration of twelve thousand dollars ($12,000) but your oratrix shows that the said Louisa Kolze, was not a *bona fide* purchaser of said premises, but that said conveyance was made to her to hold for the benefit of the family, and she is charg-able with notice of the facts hereinbe-

fore recited, that the notes secured by said trust deeds were not paid, and that the said three trust deeds were not cancelled, and the said Louisa Kolze took whatever interest she acquired in and to said premises by such conveyance, in all respects subject and subsequent to the lien of said three trust deeds for the securing of the said nine notes respectively, held and owned by your oratrix, as aforesaid, and her rights and interest in said premises should be so declared to be subject to the rights of your oratrix by the decree of this honorable court.

14 Your oratrix further represents and shows unto your *owners* that for the ostensible purpose of securing ten thousand dollars ($10,000.) of the purchase money of the said premises upon the said conveyance to the said Louisa Kolze, the said Louisa Kolze, made, executed and delivered to the said Friedrich Kolze, her principal promissory note for the sum of ten thousand dollars ($10,000) and secured the same to be paid by her certain trust deed in and by which trust deed the said Louisa Kolze conveyed to the defendant Percy V. Castle, as trustee, the defendant Arista B. Williams, being therein named as successor in trust, the said premises embraced in said three trust deeds, so owned by your oratrix and other property, which trust deed bears date the 27th day of October, A. D. 1898, and was acknowledged on to-wit: October 28th, A. D. 1898, and recorded in the recorder's office of Cook county on, to-wit: October 29th, 1898, in Book 5374 of Records, at page 94, and your oratrix shows that the defendant Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, is now the owner and holdof said note and trust deed last above mentioned, but that his interest as such owner and holder if any interest in fact exists, is in all respects subject and subsequent to the rights of your oratrix as the owner of said nine promissory notes and three trust deeds hereinbefore described and owned by your oratrix as aforesaid, and should be so declared to be by the order and decree of this honorable court.

Your oratrix further shows that under the option granted her in and by said three trust deeds she has heretofore, on, to-wit:
15 the date of the commencement of this suit, declared the said notes to be due and payable, and your oratrix shows that there is now due and unpaid to your oratrix the full amount of said notes, together with interest thereon from the date thereof according to the terms of said notes.

Your oratrix further shows that there is further due to your oratrix, the sum of three hundred dollars ($300.) being one hundred dollars ($100.) under each of said three trust deeds, as and for her solicitors' fees incurred in this proceeding.

Forasmuch, therefore, as your oratrix is without remedy in the premises save in a court of equity and to the end that the said Abraham L. Day, a bachelor, Charles E. Stade, as trustee, Frank Stade, as successor in trust, Louisa Kolze, a spinster, Lina Kolze, widow of Fr-edrich Kolze, deceased, Fred H. Kolze, as administrator of the

estate of Friedrich Kolze, aforesaid, Percy V. Castle, as trustee, and Arista B. Williams, as successor in trust, who are made parties defendant to this bill, may be required to make full, true and direct answer to the same, but not under oath, the answer under oath being hereby waived; that the said release deed so executed by the said Charles E. Stade, trustee, to the said Friedrich Kolze may be decreed to be fraudulent and void and of no effect whatsoever, as against the said nine notes and said three trust deeds so executed by the said Abraham L. Day, and now owned by your oratrix as hereinbefore set forth, and that said release deed may be set aside and held for naught by this honorable court; that the rights of all the defendants herein may be declared to be in all respects subject and subsequent to the rights of your oratrix under
16 said nine notes and three trust deeds, so held and owned by her, as aforesaid; that a receiver may be appointed by this honorable court with the usual powers of receivers in chancery, to take immediate possession of and to lease and collect the rents from said premises described in said trust deeds, during the pendency of this suit, and during the statutory time of redemption from any sales that may be made by order of this honorable court, according to the provisions of said trust deed; and your oratrix prays that an accounting may be had and taken in this behalf by and under the direction of the court; and that any and all of the defendants found liable thereof may be decreed to pay whatsoever sum or sums shall appear to be due to your oratrix upon said three several set of notes, secured by said three trust deeds respectively, at the time of the taking of said account, as well also as for the necessary disbursements made under and by virtue of the provisions of said trust deed, for the preservation of the lien thereof upon said premises, together with the costs of this proceeding, including the sum of one hundred dollars ($100) under each of said trust deeds, as and for her solicitors' fees as authorized by said deeds of trust, by a short day to be fixed by the court; that in default of payment of the amounts decreed to be due to your oratrix under either of said three trust deeds, then that the premises embraced in any, either or all of said trust deeds as to which default shall be made, may be sold as my be directed by the court, to specify the amount so found due, under any, either, or all of said three trust deeds as to which default in payment shall be made, together with costs as aforesaid; that in case of a sale of the premises embraced in any, either, or all of said trust deeds under said decree for a less amount then the sum so
17 found due, under said trust deed or trust deeds as to which a sale or sales shall be made respectively, then that execution may issue forthwith for the collection of such deficiency, against any of the said defendants who may be found liable therefor, pursuant to the statute in such case made and provided, and that in case of the sale of said premises, or any part thereof, and a failure to redeem therefrom, pursuant to statute, the defendants and all persons claiming by, through or under them, subsequent to the

commencement of this suit, may be forever barred and foreclosed of all right and equity of redemption in said premises so sold, and that such other and further relief may be granted in the premises as equity may require and to your honors shall seem meet.

May it please your honors to enter a rule upon all the defendants in this cause, to-wit: Abraham L. Day, Charles E. Stade, as trustee, Frank Stade, as successor in trust, Louisa Kolze, a spinster, Lina Kolze, widow of Friedrich Kolze, deceased, Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, Percy V. Castle, as trustee, and Arista B. Williams, as successor in trust, to answer this amended bill by a short day to be fixed by the court.

And your oratrix will ever pray, etc.

CHARLOTTE E. HOADLEY,
By STILLMAN & MARTYN,
Her Solicitors.

STILLMAN & MARTYN,
Compl't's Sol'r.
EDWIN M. ASHCRAFT,
Of Counsel.

18 EXHIBIT "A."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

One year after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee of even date herewith on real estate in Cook Co., Illinois, and is to bear interest at the rate of seven per cent. per annum after maturity.

(Signed) ABRAHAM L. DAY.

No. 16.

(Endorsement:) Abraham L. Day.

EXHIBIT "B."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

Two years after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee of even date herewith, on real estate in Cook Co., Ills., and is to bear interest at the rate of seven per cent. per annum after maturity.

(Signed) ABRAHAM L. DAY.

No. 17.

(Endorsement:) Abraham L. Day.

19 EXHIBIT "C."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

Three years after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee, of even date herewith, on real estate in Cook Co., Ills., and is to bear interest at the rate of seven per cent. per annum, after maturity.

(Signed) ABRAHAM L. DAY.

No. 18.

(Endorsement:) Abraham L. Day.

20 EXHIBIT "D."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

One year after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee of even date herewith on real estate in Cook Co., Illinois, and is to bear interest at the rate of seven per cent. per annum after maturity.

(Signed) ABRAHAM L. DAY.

No. 19.

(Endorsement:) Abraham L. Day.

EXHIBIT "E."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

Two years after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee of even date herewith, on real estate in Cook Co., Ills., and is to bear interest at the rate of seven per cent. per annum after maturity.

(Signed) ABRAHAM L. DAY.

No. 20.

(Endorsement:) Abraham L. Day.

21

EXHIBIT "F."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

Three years after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee, of even date herewith, on real estate in Cook Co. Ills., and is to bear interest at the rate of seven per cent. per annum, after maturity.

(Signed) ABRAHAM L. DAY.

No. 21.

(Endorsement:) Abraham L. Day.

22

EXHIBIT "G."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

One year after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee of even date herewith on real estate in Cook Co., Illinois, and is to bear interest at the rate of seven per cent. per annum after maturity.

(Signed) ABRAHAM L. DAY.

No. 31.

(Endorsement:) Abraham L. Day.

EXHIBIT "H."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

Two years after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee of even date herewith, on real estate in Cook Co., Ills., and is to bear interest at the rate of seven per cent. per annum after maturity.

(Signed) ABRAHAM L. DAY.

No. 32.

(Endorsement:) Abraham L. Day.

23 EXHIBIT "I."

Trust Deed Note.

$600 00/100. CHICAGO, November 17th, 1897.

Three years after date for value received I promise to pay to the order of myself the sum of six hundred dollars, at the Northern Trust Company bank, Chicago, Illinois, with interest thereon at the rate of six per cent. per annum, payable annually.

This note is secured by a trust deed to Charles E. Stade, trustee, of even date herewith, on real estate in Cook Co. Ills., and is to bear interest at the rate of seven per cent. per annum, after maturity.

(Signed) ABRAHAM L. DAY.

No. 33.

(Endorsement:) Abraham L. Day.

24 EXHIBIT "J."

Trust Deed—Statutory, under Law of 1879.

No. 790.

This indenture witnesseth, that the grantor, Abraham L. Day, bachelor of the city of Chicago, in the county of Cook and State of Illinois, for and in consideration for the sum of eighteen hundred (1800) dollars, in hand paid, conveys and warrants to Charles E. Stade, of the city of Chicago, county of Cook and State of Illinois the following described real estate, to wit: Lots twenty-five (25) to forty-eight (48) both inclusive in block seven (7) in B. L. Lee's addition to Fairview, said addition being a subdivision of the south half of the north east quarter of the south west quarter and the south east quarter of the south west quarter of section nine (9) township forty (40) north, range twelve (12) east of the third principal meridian, map whereof is recorded in the recorder's office of said Cook county as Doc. No. 1,656,444 in Book 53 of Plats page 36. Said premises being situated in the county of Cook, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State of Illinois, and all right to retain possession of said premises after any default in payment or a breach of any of the covenants or agreements herein contained in trust, nevertheless, for the following purposes:

Whereas, the said Abraham L. Day grantor herein is justly indebted upon his three (3) promissory note- bearing even date herewith, payable to the order of himself (and by him duly endorsed and delivered) for the principal sum of six hundred dollars ($600) each, due and payable in 2 and 3 years respectively from the date thereof, with interest thereon at 6 % per annum, payable annually, until due, principal and interest are payable at the Northern Trust Company bank, Chicago, Illinois, and are to bear interest at the rate of 7 % per annum after due, said notes being numbered 31, 32 and 33 respectively.

Now, if default be made in the payment of the said several promissory notes, or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste, or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained, then in such case the whole of said principal sum and interest, secured by the said several promissory notes, shall thereupon, at the option of the legal holder, or holders thereof, become immediately due and payable; and, on the application of the legal holder of said promissory notes, or either of them, it shall be lawful for the said grantee, or his successor in trust, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents, is-

sues and profits thereof; and, in his own name or otherwise, to file a bill or bills in any court having jurisdiction thereof against the said party of the first part, his heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purpose herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the cost of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and one hundred dollars attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at six per cent. per annum, then to pay the principal of said notes, whether due and payable by the terms thereof or the option of the legal holder thereof, and interest due on said notes, up to the time of such sale, rendering the overplus, if any, unto the said party of the first part, his legal representatives or assigns, on reasonable request, and to pay any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales, and it shall not be the duty of the purchaser to see to the application of the purchase money.

When the said notes and all expenses accruing under this trust deed shall be fully paid, the said grantee or his successor or legal representatives shall re-convey all of said premises remaining unsold to the said grantor or his heirs or assigns, upon receiving his reasonable charges therefor. In case of death, resignation, removal from Cook county, or other inability to act of said grantee Charles E. Stade then Frank Stade of said Cook county is hereby appointed and made successor in trust herein, with like power and authority, as is hereby vested in said grantee. It is agreed that said grantor shall pay all costs and attorney's fees incurred or paid by said grantee or the holder of said notes, in any suit in which either of them may be plaintiff or defendant, by reason of being a party to this trust deed, or a holder of said notes, and the same shall be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof.

Witness, the hand and seal of the said grantor this seventeenth day of November, A. D. 1897.

(Signed) ABRAHAM L. DAY. [SEAL.]

[Endorsed:] Trust deed. Statutory form. Abraham L. Day to Charles E. Stade. State of Illinois, Cook county, ss. No. 2619060. This instrument was filed for record in the recorder's office of Cook county aforesaid, on the 24 day of Nov. A. D. 1897, at 2 o'clock p. m., and recorded in Book 5367 of Records on page 98. (Signed) Robert M. Simons, recorder. 12 m.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Arthur Luehr, a notary public in and for said county in the State aforesaid, do hereby certify that Abraham L. Day (a bachelor) personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

(Arthur Luehr, Notary Public, Cook County, Ill.)

Given under my hand and notarial seal, this 23rd day of November A. D. 1897.

(Signed) ARTHUR LUEHR,
Notary Public.

25 EXHIBIT "K."

Trust Deed—Statutory, under Law of 1879.

No. 790.

This indenture witnesseth, that the grantor Abraham L. Day, bachelor of the city of Chicago, in the county of Cook and State of Illinois, for and in consideration for the sum of eighteen hundred (1800) dollars, in hand paid, conveys and warrants to Charles E. Stade of the city of Chicago, county of Cook and State of Illinois, the following described real estate, to wit: Lots twenty-five (25) to forty-eight (48) both inclusive in block five (5) in B. L. Lee's addition to Fairview, said addition being a subdivision of the south half of the northeast quarter, of the south west quarter and the south east quarter of the south west quarter of section nine (9) township forty (40) north, range twelve (12) east of the third principal meridian, map whereof is recorded in the recorder's office of said Cook county, as Doc. No. 1,656,444 in Book 53 of Plats page 36. Said premises being, situated in the county of Cook, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State of Illinois, and all right to retain possession of said premises after any default in payment or a breach of any of the covenants or agreements herein contained in trust, nevertheless, for the following purposes:

Whereas, the said Abraham L. Day grantor herein is justly indebted upon his three (3) promissory notes bearing even date herewith, payable to the order of himself (and by him duly endorsed and delivered) for the principal sum of six hundred (600) dollars each, due and payable in 1, 2 and 3 years respectively, from the date thereof, with interest thereon at 6% per annum, payable annually until due.

Principal and interest are payable at the Northern Trust Company bank, Chicago, Illinois, and are to bear interest at 7% per annum after due, said notes being numbered 19, 20 and 21 respectively.

Now, if default be made in the payment of the said several promissory notes, or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste, or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained, then in such case the whole of said principal sum and interest, secured by the said several promissory notes, shall thereupon, at the option of the legal holder, or holders thereof, become immediately due and payable; and, on the application of the legal holder of said promissory notes, or either of them, it shall be lawful for the said grantee, or his successor in trust, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents, issues and profits thereof; and, in his own name or otherwise, to file a bill or bills in any court having jurisdiction thereof against the said party of the first part, his heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purpose herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the cost of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and one hundred dollars attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at six per cent. per annum, then to pay the principal of said notes, whether due and payable by the terms thereof or the option of the legal holder thereof, and interest due on said notes, up to the time of such sale, rendering the overplus, if any, unto the said party of the first part, — legal representatives or assigns, on reasonable request, and to pay any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales, and it shall not be the duty of the purchaser to see to the application of the purchase money.

When the said notes and all expenses accruing under this trust deed shall be fully paid, the said grantee or his successor or legal representatives shall re-convey all of said premises remaining unsold to the said grantor or his heirs or assigns, upon receiving his reasonable charges therefor. In case of death, resignation, removal from Cook county, or other inability to act of said grantee Charles E. Stade then Frank Stade of said Cook county is hereby appointed and made successor in trust herein, with like power and authority, as is hereby vested in said grantee. It is agreed that said grantor shall pay all costs and attorney's fees incurred or paid by said

grantee or the holder of said notes in any suit in which either of them may be plaintiff or defendant, by reason of being a party to this trust deed, or a holder of said note-, and the same shall be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof.

Witness, the hand and seal of the said grantor this seventeenth day of November A. D. 1897.

(Signed) ABRAHAM L. DAY. [SEAL.]

[Endorsed:] Trust deed. Statutory form. Abraham L. Day to Charles E. Stade. State of Illinois, Cook county, *ss.* No. 2619056. This instrument was filed for record in the recorder's office of Cook county aforesaid, on the 24 day of Nov. A. D. 1897, at 2 o'clock p. m., and recorded in Book 5367 of Records on page 94. (Signed) Robert M. Simons recorder. 12 m.

STATE OF ILLINOIS, } *ss.*:
County of Cook, }

I, Arthur Luehr, a notary public, in and for said county, in the State aforesaid, do hereby certify that Abraham L. Day (a bachelor) personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

(Arthur Luehr, Notary Public, Cook County, Ill.)

Given under my hand and notarial seal, this 23rd day of November A. D. 1897.

(Signed) ARTHUR LUEHR,
Notary Public.

26 EXHIBIT "L."

Trust Deed—Statutory, under Law of 1879.

No. 790.

This indenture witnesseth, that the grantor Abraham L. Day, bachelor, of the city of Chicago, in the county of Cook and State of Illinois, for and in consideration for the sum of eighteen hundred (1800) dollars, in hand paid, conveys and warrants to Charles E. Stade of the city of Chicago, county of —— and State of *Cook*, the following described real estate, to wit: Lots one (1) to twenty-four (24) both inclusive in block five (5) in B. L. Lee's addition to Fairview, said addition being a subdivision of the south half of the north east quarter of the southwest quarter and the south east quar-

ter of the south west quarter of section nine (9) township forty (40) north, range twelve (12) east of the third principal meridian, map whereof is recorded in the recorder's office of said Cook county, as doc. No. 1656444 in Book 53 of Plats page 36, situated in the county of Cook, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State of Illinois, and all right to retain possession of said premises after any default in payment or a breach of any of the covenants or agreements herein contained in trust, nevertheless for the following purposes:

Whereas, the said Abraham L. Day grantor herein is justly indebted upon his three promissory notes, bearing even date herewith, payable to the order of himself, (and by him duly endorsed and delivered) for the principal sum of six hundred (600) dollars each, due and payable respectively in 1, 2 and 3 years from the date thereof, with interest thereon at six per cent. per annum, payable annually, until due, principal and interest are payable at the Northern Trust Company bank, Chicago, Illinois, and are to bear interest at the rate of 7 % per annum after due. Said notes being numbered 16, 17 and 18 respectively.

Now, if default be made in the payment of the said several promissory notes, or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste, or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained, then in such case the whole of said principal sum and interest, secured by the said several promissory notes, shall thereupon, at the option of the legal holder, or holders thereof, become immediately due and payable; and, on the application of the legal holder of said promissory notes, or either of them, it shall be lawful for the said grantee, or his successor in trust, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents, issues and profits thereof; and, in his own name or otherwise, to file a bill or bills in any court having jurisdiction thereof against the said party of the first part, his heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purpose herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the cost of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and one hundred dollars attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at six per cent. per annum, then to pay the principal of said notes, whether due and payable by the terms thereof or the option of the legal holder thereof, and interest

due on said notes, up to the time of such sale, rendering the overplus, if any, unto the said party of the first part, — legal representatives or assigns, on reasonable request, and to pay any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales, and it shall not be the duty of the purchaser to see to the application of the purchase money.

When the said notes and all expenses accruing under this trust deed shall be fully paid, the said grantee or his successor or legal representatives shall re-convey all of said premises remaining unsold to the said grantor or his heirs or assigns, upon receiving his reasonable charges therefor. In case of death, resignation, removal from Cook county, or other inability to act of said grantee Charles E. Stade then Frank Stade of said Cook county is hereby appointed and made successor in trust herein, with like power and authority, as is hereby vested in said grantee. It is agreed that said grantor shall pay all costs and attorney's fees incurred or paid by said grantee or the holder of said notes, in any suit in which either of them may be plaintiff or defendant, by reason of being a party to this trust deed, or a holder of said notes, and the same shall be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof.

Witness, the hand and seal of the said grantor this seventeenth day of November, A. D. 1897.

(Signed) ABRAHAM L. DAY. [SEAL.]

[Endorsed:] Trust deed. Statutory form. Abraham L. Day to Charles E. Stade. State of Illinois, Cook county, ss. No. 2619055. This instrument was filed for record in the recorder's office of Cook county aforesaid, on the 24 day of Nov. A. D., 1897, at 1 o'clock p. m., and recorded in Book 5367 of Records on page —. Signed Robert M. Simons, recorder.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Arthur Luehr a notary public in and for said county, in the State aforesaid, do hereby certify that Abraham L. Day (a bachelor) personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

(Arthur Luehr, Notary Public, Cook County, Ill.)

Given under my hand and notarial seal, this 23rd day of November, A. D. 1897.

(Signed) ARTHUR LUEHR,
Notary Public.

27 (Endorsed:) Filed Nov. 20, 1903. Marshall E. Sampsell, clerk.

28 And on to-wit: the fourteenth day of January, 1904, came Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle as trustee and Arista B. Williams as successor in trust by their solicitors, Castle, Williams and Smith and filed in the clerk's office of said court in said entitled cause a certain motion to dismiss the amended bill, which said motion is in words and figures following to-wit:

Motion to Dismiss Amended Bill.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

In the United States Circuit Court, Northern District, Northern Division.

CHARLOTTE E. HOADLEY, Complainant,
vs.
ABRAHAM L. DAY ET AL., Defendants. } Consolidated Causes No. 25192.

To the honorable, the judges of said court, in chancery sitting:

Now comes the defendants Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle as trustee and Arista B. Williams as successor in trust, and move the court to dismiss the amended bill of complaint herein for want of jurisdiction as apparent from the original bills of complaint filed in said consolidated suits, and from said amended bill, because it does not appear either from said original bills of complaint or from said amended bill of complaint, that the proper diversity of citizenship existed at the time of the commencement of the said suits, thereafter consolidated, between Friedrich Kolze, alleged
29 in said amended bill of complaint to have been the original owner of the nine promissory notes and the three trust deeds securing the same, in said amended bill of complaint described, or said Charles E. Stade, therein alleged to be his trusted agent in the premises, the assignors of said Charlotte E. Hoadley, complainant, and the defendants, or any of them, so as to confer jurisdiction upon said circuit court of the United States, or upon any Federal court.

CASTLE, WILLIAMS & SMITH,
Solicitors for said Defendants.

(Endorsed:) Filed Jan. 14, 1904. Marshall E. Sampsell, clerk.

30 And on to-wit: the 8th day of February, 1904, being one of the days of the regular December term of said court, 1903, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to-wit:

Order of February 8, 1904, Overruling Motion to Dismiss Amended Bill.

CHARLOTTE E. HOADLEY
vs. } 25192.
ABRAHAM L. DAY ET AL.

Now come the parties by their solicitors and the court having considered and being now fully advised in the premises, overrules the motion of the defendants to dismiss.

And thereupon the defendants have leave to elect within fifteen days whether to stand by the motion to dismiss or plead to said amended bill.

31 And on to-wit: the 25th day of February, 1904, came Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams by their solicitors and file in the clerk's office of said court their certain plea to the amended bill in words and figures following to-wit:

Plea to Amended Bill.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss.:*

In the United States Circuit Court, Northern District, Northern Division.

CHARLOTTE E. HOADLEY, Complainant,
vs. } Consolidated Causes No. 25192.
ABRAHAM L. DAY ET AL., Defendants.

The plea of Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee, and Arista B. Williams, as successor in trust, defendants, to the amended bill of complaint.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's amended bill of complaint mentioned and contained, to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to said amended bill, say:

32 That this court ought not to take further cognizance of or sustain the said amended bill of complaint, because they say, that they, the said defendants, and the said defendant Abraham L. Day, at the time of the filing of the said bills of complaint in said suits thereafter consolidated, were, and still are, all each and every one citizens of the State of Illinois; that said suit is brought by said plaintiff as assignee, from one William P. Smith, who had theretofore obtained the notes and trust deeds hereinafter described, by assignment from said defendant Charles E. Stade, to recover the contents of certain choses in action, to-wit: nine (9) certain promissory notes dated November 17th A. D. 1897, payable to the order of himself, and by him duly endorsed, signed by said Abraham L. Day, secured by three certain trust deeds of even date therewith from said Abraham L. Day to Charles E. Stade as trustee, conveying certain premises in the county of Cook and State of Illinois; that said plaintiff did not advance or cause to be advanced a large sum of money upon the note of said Charles E. Stade alleged in said amended bill to have been the trusted agent of one Friedrich Kolze, secured to be paid by the pledge of the said nine promissory notes and said three trust deeds as collateral security therefor, as in said amended bill alleged; that on the contrary the said nine promissory notes and three trust deeds signed by the said Abraham L. Day, were deposited by the said Charles E. Stade with said William P. Smith, or some person or persons acting for him, to secure the payment of a certain promissory note for one thousand ($1,000.00) dollars, signed by him, said Charles E. Stade, payable to the order of said William P. Smith, and also to secure said William P. Smith for the faithful performance by said Stade of a certain contract of employment entered into between said Stade and said Smith on or about the date of said note for one thousand ($1,000.00)
33 dollars; that thereafter, on or about April 21, 1899, said Charles E. Stade having failed and refused to pay said note for one thousand ($1,000.00) dollars when the same became due by its terms, or to perform said contract on his part, the said William P. Smith caused to be sold in accordance with the terms of the said collateral note for one thousand ($1,000.00) dollars signed by said Stade, the said collateral, towit: the nine promissory notes and the three trust deeds signed by said Abraham L. Day, the contents of which are herein sought to be recovered; that said nine notes and three trust deeds signed by said Abraham L. Day were thereupon bid in and became the property of said plaintiff Charlotte E. Hoadley; that said Charles E. Stade and said William P. Smith, the successive assignors of the said plaintiff as aforesaid, were each and both, at the time of the filing of said bills, and still are, citizens of the State of Illinois, the same State of which said maker of said notes and trust deed-, Abraham L. Day, was at the time of the filing of said bills, and still is a resident, and were not at the time of filing said bills, and still are not, citizens of the State of Massachusetts; that suit to recover the contents of said choses in action,

to-wit: the said nine promissory notes and three trust deeds, signed by said Abraham L. Day, could not have been prosecuted by said Charles E. Stade or said William P. Smith, or either of them, in said circuit court of the United States, if no assignment or transfer of said notes and trust deeds had been made, all of which matters and things these defendants do aver to be true and are ready to verify.

Wherefore they plead the same to said amended bill of complaint, and pray that judgment of this honorable court, whether they should be compelled to make any further answer to said amended bill.

CASTLE, WILLIAMS & SMITH,
Solicitors for Defendants.

34 I hereby certify that in my opinion the foregoing plea of Fred H. Kolze, administrator, etc., Lina Kolze, Louisa Kolze, Percy V. Castle as trustee and Arista B. Williams as successor in trust, defendants, to the amended bill of complaint of Charlotte E. Hoadley, complainant, is well founded in law, and proper to — filed in the above cause.

HOWARD P. CASTLE,
Solicitor for said Defendants.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

Percy V. Castle, one of said defendants, on oath states that he has heard read the foregoing plea to the amended bill of complaint of Charlotte E. Hoadley in said suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

PERCY V. CASTLE.

Subscribed and sworn to before me, this 22nd day of February, A. D. 1904.

[SEAL.] ELDON M. VOTAW,
Notary Public.

(Endorsed:) Filed Feb., 25, 1904, Marshall E. Sampsell, clerk.

35 And on to-wit: the 5th day of April, 1904, being one of the days of the regular December term of said court, 1903, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to-wit:

Order of April 5, 1904.

CHARLOTTE E. HOADLEY
vs.
ABRAHAM L. DAY. } 25192.

Now come the parties by their solicitors and now comes on to be heard the sufficiency of the plea to the amended bill of complaint herein, and the court having heard the same and being now fully advised in the premises, finds that said plea is insufficient, and the defendants are ruled to answer the said amended bill within ten days.

36 And on to-wit: the twenty-fifth day of May, 1904, being one of the days of the regular December term of said court, 1903, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to-wit:

Decree of May 25, 1904.

CHARLOTTE E. HOADLEY
vs.
ABRAHAM L. DAY, CHARLES E. STADE, Trustee; FRANK Stade, Successor in Trust; Fred H. Kolze, as Administrator of the Estate of Friedrich Kolze, Deceased; Lina Kolze, a Widow; Louisa Kolze, a Spinster; Percy V. Castle, as Trustee; Arista B. Williams, as Successor in Trust. } 25192.

And now this day comes the complainant, Charlotte E. Hoadley, by Herman W. Stillman, her solicitor, the said Herman W. Stillman, being now substituted as the solicitor for said complainant in place of Stillman and Martyn, and by Edwin M. Ashcraft associate counsel for said complainant, and the defendants Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, a widow, Louisa Kolze, a spinster, Percy V. Castle, as trustee, Arista B. Williams, successor in trust, all by Castle, Williams & Smith, their solicitors.

37 And upon motion of said complainant, by her said solicitor, it is hereby ordered that the order heretofore entered in the above entitled cause on, to wit: November 20, 1903, and whereby leave was given to the said complainant, to file the amended bill herein instanter, be and the same is hereby modified and amended *nunc pro tunc* as of said date, so that the same shall read as follows: On motion of the complainant's solicitor, and upon notice to the defendants, leave is hereby given to file the amended bill herein instanter, the defendants to plead to the same within ten days, all

without prejudice to the reference heretofore made in said cause to William M. Booth, Esq., master in chancery of this court, to take proofs and report the same together with his conclusions, and without prejudice to the proceedings had and taken before said master, and to the said master's report, filed herein, and to the exceptions thereto.

And it is now further ordered, adjudged and decreed by the court that the filing of the said amended bill of complaint herein on, to wit: November 20th, 1903, shall in no wise affect the said reference and the proceedings thereunder, and the said master's report and the exceptions thereto, heretofore filed in this cause.

And upon motion of said complainant this cause is now dismissed as to the defendant, Abraham L. Day.

And this said cause coming on now to be heard upon the said amended bill of complaint herein, heretofore taken as confessed, by and against the defendants, Charles E. Stade, as trustee, Frank Stade, as successor in trust, the defaults of said defendants for greater certainty, being now again entered herein of record in said cause, and upon the said amended bill, also taken as confessed by and against
38 the defendants Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams, as successor in trust, for want of answer pursuant to the rule of court, entered herein on, to-wit: April 5th, 1904, upon the overruling of the plea of said defendants to the said amended bill of complaint herein, which defaults of the said defendants are now hereby entered of record in the said cause.

And this cause also coming on to be heard upon the report of William M. Booth, Esq., master in chancery of this court, which report bears date and was filed herein on, to-wit: May 25th, A. D. 1903, and was made in pursuance of an order of this court, heretofore made in this cause, referring it to the said master to take proofs in said cause and to compute the amount due to the complainant upon the notes and the trust deeds and the covenants therein contained, mentioned and set forth in the original bill of complaint filed herein, and the bills of complaint in the two suits of Charlotte E. Hoadley *vs.* Abraham L. Day, *et al.*, Gen. No. 25,193 and 25,194, respectively, all of which notes and trust deeds are mentioned and set forth in the amended bill of complaint, filed in this cause, and which report was filed herein on, to-wit: May 25th, A. D. 1903, as aforesaid;

And this cause having been heretofore brought on to be heard, upon said master's report and the exceptions thereto, and the court having heard the arguments of counsel for the respective parties herein, and having fully considered the said master's report, and the exceptions thereto, and the court now being fully advised in the premises, doth order, adjudge and decree that the exceptions to said report be and the same are hereby overruled and said report, and the things therein contained, do stand ratified and confirmed;

39 And the court being fully advised in the premises, further finds that it has jurisdiction of the parties to this cause and of the subject matter thereof; that the material allegations in the amended bill of complaint in said cause contained, are true as therein stated; that the notes and trust deeds mentioned and described in the said amended bill of complaint were duly executed, and the said three trust deeds were duly acknowledged and recorded as in said amended bill of complaint set forth,

The court further finds that subsequently to the execution of the three sets of notes and the three trust deeds in said amended bill of complaint described, the said Abraham L. Day, a bachelor, by deed dated and acknowledged on, to-wit: the 23rd day of November, A. D. 1897, and delivered and recorded on, to-wit: the 30th day of June, A. D. 1898, conveyed the premises embraced in said three trust deeds with other property, to Friedrich Kolze, who was a defendant in this cause, and has departed this life *pendente lite*, the said Friedrich Kolze being the same party from whom the said Abraham L. Day had acquired title to said premises at or shortly prior to the execution of said trust deeds; and the court finds that thereafter, by release deed, dated on, to-wit: October 27th, A. D. 1898, and recorded on, to-wit: October 29th, A. D. 1898, in the recorder's office of Cook county, aforesaid, as document 2,747,648 in Book 6363 of Records at page 364, the said Charles E. Stade, trustee, did fraudulently and wrongfully release the three trust deeds in said amended bill of complaint described, together with other trust deeds, covering other property, unto the said Friedrich Kolze, the said release deed reciting that the same was made for and in consideration of one dollar ($1.00) and for other good and valuable considerations, the receipt whereof was thereby confessed and further reciting that the
40 notes secured thereby had been cancelled; and the court finds in this behalf that the indebtedness secured by such three trust deeds, and evidenced by the said notes, so owned by the complainant herein, as aforesaid, had not and has not been paid in whole or in part, and that said notes were then and now are owned by the said complainant, who is a citizen of the State of Massachusetts, and said notes had not at the date of said release and have not been cancelled; and the court finds that said notes are the genuine notes secured by said three trust deeds respectively, and the release executed by the said Charles E. Stade, trustee, was and is fraudulent as to the said complainant, and it is hereby ordered, adjudged and decreed that the said release deed was and is void and of no effect as against said complainant, as the owner and holder of said three sets of notes secured by said three trust deeds, as aforesaid, and the said release deed is hereby in all respects set aside as to said three sets of notes and three trust deeds in the amended bill of complaint described and the said three trust deeds are hereby declared to be valid first liens upon the premises in said three trust deeds respectively described, according to the terms and tenor

thereof, to all intents and purposes as though such release deed had not been executed;

The court further finds that subsequently to the execution of the three sets of notes and the three trust deeds in said amended bill of complaint described, and before the maturity of said notes, at or shortly after the delivery of the said fraudulent release deed by the said Charles E. Stade, trustee, the said Friedrich Kolze, now deceased, and Lina Kolze, his wife, conveyed the said premises described in said three trust deeds, and other property, to the defendant, Louisa Kolze, who is a daughter of said Friedrich Kolze and Lina Kolze, at an expressed consideration of twelve thousand dollars ($12,000); and that the defendant, Louisa Kolze is in
41 possession of said premises, and that the defendant Lina Kolze, is occupying said premises under a verbal lease thereof with the said Louisa Kolze, and that there was no other person in possession of said premises or any part thereof when the bill herein was filed and process served; and the court finds that under all the circumstances shown by the evidence, and returned by said master as a part of his report, the rights of said Louisa Kolze under said deed, and of Lina Kolze, her tenant, as aforesaid, are in all respects subject and subsequent to the rights of the said complainant as the owner of said three sets of notes secured by said three trust deeds, as aforesaid;

The court further finds that at the date of said execution of said deed from the said Friedrich Kolze and Lina Kolze, his wife, to Louisa Kolze, the said Louisa Kolze executed her certain promissory note for the sum of ten thousand dollars ($10,000) dated October 28th, A. D. 1898, payable five years after said date, to the order of herself and by her endorsed, also interest coupon notes attached thereto, together with a certain deed of trust from the said Louisa Kolze, to the defendant Percy V. Castle, as trustee, the defendant, Arista B. Williams, being named therein as successor in trust, said trust deed being recorded in Book 5374 of Records at page 94, as document number 2,747,680, conveying the premises described in said trust deeds so owned by the complainant herein, and other property, said trust deed being recited to be for part purchase money of said premises; and the court finds that the defendant, Fred H. Kolze, who is the duly appointed and acting administrator of the estate of Friedrich Kolze, deceased, is now the legal owner and holder of said notes and of said trust deed last described, as such administrator, and the court finds that the rights of the said owner of said notes, last above mentioned, and the lien of said trust deed securing the same, are in all respects subject and subsequent
42 to the rights of the complainant and the lien of said three trust deeds so owned by the said complainant upon the premises respectively described therein as aforesaid.

The court further finds that there is now due and owing to the said complainant, Charlotte E. Hoadley, upon the three notes for six hundred dollars ($600) each, numbered thirty one (31) thirty-two

(32) and thirty three (33) respectively, mentioned and described in the amended bill of complaint, and secured to be paid by the trust deed covering lots twenty five (25) to forty eight (48) both inclusive, in block seven (7) in B. L. Lee's addition to Fairview, said addition being a sub-division of the south half of the north east quarter of the south west quarter and the south east quarter of the south west quarter of section nine (9) township forty (40) north, range twelve (12) east of the third principal mer-dian in Cook county, Illinois, the sum of twenty five hundred and twenty three dollars ($2523.00) and the court further finds that there is due to the complainant as and for her solicitors' fees incurred in this proceeding, the sum of three hundred dollars, which sum the court finds is a usual, reasonable and customary fee for the services of complainant's solicitors herein, one third of which sum, or one hundred dollars is properly chargeable under the trust deed last above mentioned against the premises therein described; and the court further finds that there is further due and chargeable under the trust deed and against the premises last above described, one third of the fees and disbursements of the said master in chancery which the court hereby taxes at the sum of three hundred and eighty dollars ($380.00) one third of which sum is the sum of one hundred and twenty six and 66/100 dollars ($126.66) and together also with one third of the taxed costs in this court.

43 The court further finds that there is now due and owing to said complainant, Charlotte E. Hoadley, upon the three notes numbered nineteen (19) twenty (20) and twenty one (21) respectively, for six hundred dollars ($600) each, mentioned and described in the said amended bill of complaint in this cause, and secured to be paid by the trust deed covering lots twenty five (25) to forty eight (48) both inclusive, in block five (5) in B. L. Lee's addition to Fairview, said addition being a sub-division of the south half of the northeast quarter of the south west quarter, and the south east quarter of the south west quarter of section nine (9) township forty (40) north, range twelve (12) east of the third principal meridian in Cook county, Illinois, the sum of twenty five hundred and twenty three dollars ($2523.00); and the court further finds as aforesaid, that there is due to the complainant as and for her solicitors' fees incurred in this proceeding, the sum of three hundred dollars ($300) which sum the court finds is a usual, reasonable and customary fee for the services of complainant's solicitors herein, one third of which sum, or one hundred dollars, is properly chargeable under the trust deed last above mentioned against the premises therein described; and the court further finds that there is further due and chargeable under the trust deed and against the premises last above described, one third of the fees and disbursements of the said master in chancery taxed as aforesaid, at the sum of three hundred and eighty dollars ($380) one third of which sum is the sum of one hundred and twenty six and 66/100 dollars ($126.66) and together also with one third the taxed costs in this suit.

The court further finds that there is now due and owing to said complainant, Charlotte E. Hoadley, upon the three notes numbered sixteen (16) seventeen (17) and eighteen (18) respectively, for six hundred dollars each, mentioned and described in the amended bill of complaint, and secured to be paid by the trust deed cover-
44 ing lots one (1) to twenty four (24) both inclusive, in block five, (5) in B. L. Lee's addition to Fairview, said addition being subdivision of the south half of the north east quarter of the south west quarter, and the south east quarter of the south west quarter of section nine (9) township forty (40) north, range twelve (12) east of the third principal meridian in Cook county, Illinois, the sum of twenty five hundred and twenty three ($2523.00) dollars and the court further finds, as aforesaid, that there is due to the complainant as and for her solicitors' fees incurred in this proceeding the sum of three hundred dollars ($300) which sum the court finds is a usual, reasonable and customary fee for the services of complainant's solicitors herein, one third of which sum, or one hundred dollars ($100) is properly chargeable under the trust deed above mentioned against the premises therein described; and the court further finds that there is further due and chargeable under the trust deed and against the premises last aforesaid, one third of the fees and disbursements of the said master in chancery taxes as aforesaid, at the sum of three hundred and eighty dollars ($380) one third of which sum is the sum of one hundred and twenty six and 66/100 dollars ($126.66) and together also with one third of the taxed costs in this suit.

The court further finds that the consideration for which the said three sets of notes were acquired by the complainant with interest thereon at six per cent. per annum to this date, amounts to the sum of twenty eight hundred and fifty dollars, one-third of which amount, or the sum of nine hundred and fifty dollars, is the actual consideration for each of said sets of notes hereinbefore mentioned; and said complainant in open court voluntarily remits that part of
45 several sums due as aforesaid under each of said notes and trust deeds, over and above the said sum of nine hundred and fifty (950) dollars, being the consideration for which each of said sets of notes as aforesaid, were acquired, as aforesaid, together with the solicitors' fees and other costs, as hereinbefore recited, and the court finds that after such remitting of part of the sums due the said complainant as aforesaid, there is now due and owing to the said complainant, the sum of nine hundred and fifty dollars ($950) together with solicitors' fees and costs, as aforesaid, under each of said three sets of notes and three trust deeds hereinbefore described.

It is iurther adjudged and decreed that unless the defendants or some of them, within five days from the entry of this decree pay, or cause to be paid to the said complainant Charlotte E. Hoadley, or to her solicitors of record, the said three sums of nine hundred and fifty dollars ($950) each, due the complainant, as aforesaid, with interest thereon at the rate of 5% per annum from the entry of this

decree to the date of said payment, and also pay said sums so found due to said complainant as and for her solicitors' fees incurred in this proceeding, and pay to the officers of this court the costs of this suit, one-third of which costs are hereby taxed against each of said three parcels of land embraced in said three trust deeds in said amended bill of complaint described respectively; that the premises in said trust deeds and in said amended bill, and hereinbefore described, as to which default in payment shall be made, or so much thereof as may be necessary to pay the amounts so found to be due to the complainant, with interest thereon, and costs and solicitors' fees aforesaid, chargeable against said several tracts as hereinbefore found as to which said default shall be made, and which may be sold separately, without material injury to the parties in interest, respectively be sold at public auction to the highest and best bidder for cash, by William M. Booth, Esq., master in chancery, at the
46 judicial *sla*-srooms of the Chicago real estate board, number fifty seven (57) Dearborn street, in the city of Chicago, county of Cook and State aforesaid, and it is ordered and decreed that payment may be made of the amounts so found to be due, and secured by each, any or all of said three trust deeds with costs and fees aforesaid, within the time aforesaid, and that no sale shall be made of the premises upon which such payment shall be made within the time as aforesaid and that said master give public notice of the time, place and terms of the sales of such of said three tracts of land as to which default shall be made, in payment of the amount heretofore decreed against the same, by publishing an advertisement thereof once a week for four successive weeks in a newspaper, printed, regularly issued and having a general circulation in said county of Cook and State of Illinois, the first publication of such notice being not less than twenty eight days previous to the time of such sale; and that the complainant, or any of the parties to this suit may become the purchaser or purchasers at said sales; that at such sale the said several tracts of land described in said three trust deeds hereinbefore referred to respectively, or such parts thereof as shall be sufficient to realize the several amounts so found due to the said complainant, chargeable against said several tracts, as aforesaid, shall be offered separately for the said debt so chargeable against the same respectively, so that the said sales so made by the said master shall in all respects be made separately, to all intents and purposes as though each of said trust deeds were separately foreclosed and three separate decrees were entered by this court therein; that upon such sales being made, said master shall execute and deliver to any purchaser or purchasers a certificate or certificates of sale evidencing such several purchases, describing the premises purchased, the amount paid therefor, or if purchased by the complainant, the amount of her bid, in each instance, and the time when said purchaser or pur-
47 chasers will be entitled to deeds for said premises, if the same shall not be redeemed according to law, and that within ten days from such sale the said master file duplicates of such certifi-

cates in the office of the recorder of deeds of said Cook county, all in pursuance of the law of the State of Illinois, in such cases made and provided.

It is further ordered that if the said premises, or any parcel thereof, shall at such sale be struck off and sold by the master to the complainant in this cause, the complainant shall be required to pay to the master only so much of the complainant's bid as shall be sufficient (taken together with other moneys paid to the master at such sale, on bids for parcels by other persons, if any there be), to satisfy the expenses of the sale, and the master's fees, disbursements and expenses, and the costs of this suit, and also any excess of the remainder of the amount of said bid, after such payment, over the amount due the complainant under this decree for indebtedness secured by said trust deeds as aforesaid.

Is is further ordered that said master make report to this court of such sale and of his acts and doings hereunder for approval and confirmation, and for further direction herein; and that he retain from the moneys received by him on any sale under this decree, the amount of his fees, disbursements and commissions thereon, and bring the residue of such moneys, if any, into court to abide the further order of the court, and that he take the receipt of the clerk of this court therefor, and file the same with said report; and if the price for which said several parcels shall be so sold shall be insufficient to satisfy the amount so found and adjudged to be due to the complainant chargeable against the same, as aforesaid, with interest thereon, and the costs of suit and expenses of sale as aforesaid, that the said master specify the amount of such deficiency or deficiencies in his said report of sale.

48 And it is further ordered that the clerk of this court hold such moneys so to be paid him by said master subject to the further order and direction of this court in this cause.

It is further ordered that if any sale made by said master under this decree shall be confirmed by this court, and if the land so sold shall not be redeemed according to the laws of the State of Illinois, the said master in chancery of this court shall, after the expiration of the time allowed by law for such redemption, execute and deliver to the legal holder of any certificate of sale issued under this decree a deed of conveyance of the land in such certificate described (which shall not have been so redeemed) without further order.

And it is further ordered, adjudged and decreed that the defendants in this cause, and all persons claiming by, through or under them, or either of them, since the filing of the original bill of complaint in this cause, be forever barred and foreclosed from all equity of redemption and claim of, in and to said above described land and premises, and any part and parcel thereof, which shall be sold, as aforesaid, under this decree, and which shall not be redeemed according to law.

And it is further ordered, adjudged and decreed that upon the execution and delivery of the deed or deeds of conveyance as afore-

said, the grantee or grantees, his or their heirs or assigns be let into possession of the portion of said mortgaged premises so conveyed to him or them, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any person who since the commencement of this suit has come into possession under them, or either of them, on the production of said master's deed of conveyance and of a certified copy of the order of this court confirming the report of said sale, surrender possession thereof to such grantee or grantees, his or their heirs or assigns.

49 And on the same day to-wit: the 25th day of May, 1904, came Fred H. Kolz-, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams as successor by their solicitors and filed in the clerk's office of said court in said entitled cause certain assignment of errors and petition for appeal in words and figures following to-wit:

Assignment of Errors and Petition for Appeal.

UNITED STATES OF AMERICA, Northern District of Illinois, } ss:

In the United States Circuit Court, Northern District of Illinois, Northern Division.

CHARLOTTE E. HOADLEY, Complainant, vs. ABRAHAM L. DAY ET AL., Defendants. } Consolidated Causes No. 25192.

To the honorable the judges of said court, in chancery sitting:

Your petitioners, Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams, as successor in trust, defendants in said suit, respectfully represent that there is manifest error committed to the injury of the petitioners by the final decree entered in said cause on the 25th day of May, A. D. 1904, and by the interlocutory orders theretofore entered by said court in said cause, denying the motion in writing of your petitioners filed January 13th, 1904, to dismiss the amended bill of complaint herein, for want of jurisdiction because it did not appear that the proper diversity of citizenship existed at the time of the commencement of the said suits thereafter consolidated, between Friedrich

50 Kolze or Charles E. Stade, alleged to be his agent, the assignors of said Charlotte E. Hoadley complainant, and the defendants, or any of them, so as to confer jurisdiction upon said circuit court of the United States or upon any Federal court, and also overruling the plea of your petitioners filed herein February 25, 1904, said plea being to the jurisdiction of said court for the

reason above stated, in and by which said interlocutory orders and final decree this court assumed and asserted jurisdiction of the subject matter of said suit.

Wherefore your petitioners, considering themselves aggrieved, pray an order granting an appeal from said final decree and interlocutory orders taking and exercising jurisdiction as aforesaid to the Supreme Court of the United States, as authorized by section 5 of the act of Congress of the United States, approved March 3, 1891, upon the filing by your petitioners of their bond in a penal sum to be fixed by said court, to be hereafter approved by this court.

And your petitioners will ever pray, etc.

FRED H. KOLZE,
Administrator of the Estate of
Friedrich Kolze, Deceased,
LINA KOLZE,
LOUISA KOLZE,
PERCY V. CASTLE,
As Trustee,
ARISTA B. WILLIAMS,
As Successor in Trust,
By CASTLE, WILLIAMS &
SMITH, Their Solicitors.

CASTLE, WILLIAMS & SMITH,
Solicitors for Petitioners.

(Endorsed:) Filed May 25, 1904, Marshall E. Sampsell, clerk.

51 And on the same day to-wit: the 25th day of May, 1904, in the December term of said court, 1903, (the parties being present and in open court) there appears in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, the following entry to-wit:

Order of May 25, 1904, Allowing Appeal upon Filing Bond, etc.

CHARLOTTE E. HOADLEY
vs.
ABRAHAM L. DAY ET AL. } 25192.

Upon consideration of the petition for appeal to the Supreme Court of the United States, filed herein by Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams as successor in trust, defendants to said suit, it is ordered that said appeal be granted, bond therefor in the penalty of one thousand dollars to be executed and filed in and approved by this court within 60 days from this date.

This appeal is granted solely upon the question of jurisdiction and unless counsel shall agree by stipulation filed with the clerk in respect to the portions of the record to be transcribed and filed in said United States Supreme Court under said appeal as prayed and granted, the appellants have leave to present the record to this court within the time above specified, for the filing of said appeal bond, for the determination of what portion of the record shall be certified to said Supreme Court under said appeal.

51½ And on to-wit: the 21st day of July, in the July term of said court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to-wit:

Order of July 21, 1904, Extending Time to File Appeal Bond.

CHARLOTTE E. HOADLEY
vs. } 25192.
ABRAHAM L. DAY.

On motion of the solicitors for the defendants, Fred H. Kolze, administrator, etc., Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams, successor in trust, it is ordered that the time for filing the appeal bond in said cause be extended ten days or until August 3rd, 1904, without prejudice to the right of Charlotte E. Hoadley, the complainant to object to the approval of the appeal bond when presented, on the ground that the record has not been filed and the appeal perfected in accordance with the rules and practice on appeals.

52 And on to-wit: the second day of August, 1904, there was filed in the clerk's office of said court in said entitled cause a certain stipulation as to parts of record to be certified on appeal, said stipulation is in words and figures following to-wit:

Stipulation as to Parts of Record to be Certified on Appeal.

UNITED STATES OF AMERICA, Northern District of Illinois, } ss:

In the United States Circuit Court, Northern District, Northern Division.

CHARLOTTE E. HOADLEY, Complainant, vs. ABRAHAM L. DAY ET AL., Defendants. } No. 25192.

It is hereby stipulated and agreed by and between the parties hereto, by their respective solicitors, that the record on appeal in said cause, to be transcribed and filed in and certified to the Supreme Court of the United States, under the appeal in said cause to said Supreme Court of the United States, as heretofore prayed and granted solely upon the question of jurisdiction, and referred to in and by the order of said court granting said appeal, shall be and consist of the following matters shown of record in said cause, to-wit:

The amended bill of complaint in said cause.

The motion of the defendants Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle as trustee and Arista B. Williams as successor in
53 trust, to have dismissed for want of jurisdiction the said amended bill of complaint.

The order of said United States circuit court overruling said motion to dismiss said amended bill for want of jurisdiction.

The plea of said defendants above named to said amended bill of complaint.

The order of said United States circuit court overruling the said plea and requiring said defendants to answer said amended bill of complaint.

The final decree in said cause entered May 25th, 1904.

The petition of said defendants above named for appeal to the Supreme Court of the United States, upon the question of jurisdiction solely, and the assignment of errors.

The order of said United States circuit court allowing said appeal.

This stipulation of the parties to said suit as to the portions of the record in said cause to be certified on said appeal.

The appeal bond filed in said court, and the order of said court approving the same.

It is further stipulated and agreed that the original bill of complaint in said cause contained no other or different jurisdictional facts or matters than are contained in the said amended bill of complaint.

And it is further stipulated, that said portion of the record in said cause shall be certified by the clerk of said United States circuit

court, as and for the record provided for in said order of court granting said appeal, and that said portions of said record when so certified as aforesaid, shall be transmitted to the said Su-
54 preme Court of the United States, and that no objection or exception shall be had thereto on such appeal by reason of any clerical mistakes or errors arising from any accidental slip or omission in said transcript of record, so certified, to said Supreme Court of the United States.

HERMAN W. STILLMAN,
Solicitor for Complainant.
CASTLE, WILLIAMS & SMITH,
Solicitors for Defendants Fred. H. Kolze, Administrator, etc.; Lina Kolze, Louisa Kolze, Percy V. Castle, Trustee, and Arista B. Williams, Successor in Trust.

(Endorsed:) Filed Aug. 2, 1904. Marshall E. Sampsell, clerk.

55 And on to-wit: the second day of August, 1904, came Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams as successor in trust as principals and William H. Craig as surety and filed in the clerk's office of said court in said entitled cause a certain bond on appeal in words and figures following to-wit:

56 Know all men by these presents, that we Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle as trustee and Arista B. Williams, as successor in trust as principals and William H. Craig, as surety, are held and firmly bound unto Charlotte E. Hoadley, in the full and just sum of one thousand dollars, to be paid to the said Charlotte E. Hoadley, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of July in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a term of the United States circuit court in chancery for the northern district of Illinois in a suit depending in said court, between Charlotte E. Hoadley, complainant and Abraham L. Day, Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased and others. A decree was rendered against the said defendants and the said Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams, as successor in trust, having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Charlotte E. Hoadley, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said Fred H. Kolz, administrator etc., Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams as successor in trust shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

HOWARD P. CASTLE.
FRED H. KOLZE, [SEAL.]
Administrator of Estate of Friedrich Kolze, Deceased.
LINA KOLZE. [SEAL.]
LOUISA KOLZE. [SEAL.]
PERCY V. CASTLE, [SEAL.]
As Trustee.
ARISTA B. WILLIAMS, [SEAL.]
As Successor in Trust.
WILLIAM H. CRAIG. [SEAL.]

Bond O. K.
H. S. STODDARD, Dep. Clerk.

Approved Aug. 2, 1904.
KOHLSAAT, J.

(Endorsed:) Filed Aug 2, 1904. Marshall E. Sampsell, clerk.

57 And on to-wit: the 2nd day of August, being one of the days of the regular July term of said court, 1904, in the record of proceedings thereof before the Hon. Peter S. Grosscup, circuit judge appears by the direction of the Hon. Christian C. Kohlsaat, district judge, the following entry to-wit:

Order of August 2, 1904, Approving Appeal Bond.

CHARLOTTE E. HOADLEY
vs.
ABRAHAM L. DAY, FRED H. KOLZE, Administrator, ET AL. } 25192.

On motion of the defendants, Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams as successor in trust. It is ordered that the bond of said defendants for appeal to the Supreme Court of the United States on the question of jurisdiction only, under the order granting said appeal, heretofore entered, this day filed, be and the same is hereby approved.

And by agreement of the parties hereto, by their respective solicitors, it is ordered that said appeal shall not act as a supersedeas, without prejudice, however, to the rights of said defendants under said appeal.

58 Præcipe for Record.

UNITED STATES OF AMERICA, Northern District of Illinois, } ss:

In the United States Circuit Court, Northern District, Northern Division.

CHARLOTTE E. HOADLEY, Complainant, vs. ABRAHAM L. DAY ET AL., Defendants. } No. 25192.

The clerk of said United States circuit court, is hereby directed to prepare a transcript of the following portions of the matters and things of record in said cause for appeal to the United States Supreme Court on the question of jurisdiction only, under the order heretofore entered, to-wit:

The amended bill of complaint.

The motion of defendants Fred H. Kolze, *et al.* to have said amended bill of complaint dismissed.

The order of said court overruling said motion.

The plea of the defendants Fred H. Kolze *et al.* to said amended bill of complaint.

The order of court overruling said plea and requiring defendants to answer.

The final decree in said cause entered May 25, 1904.

The petition of the defendants Fred H. Kolze, *et al.* for appeal to the Supreme Court of the United States upon the question of jurisdiction solely and the assignment of errors.

The order of said court allowing said appeal.

59 The stipulation of the parties to said suit as to the portions of the record to be certified on said appeal.

The appeal bond filed in said court and the order of said court approving the same.

CASTLE, WILLIAMS & SMITH,
Solicitors for Defendants Fred H. Kolze, Administrator, etc.; Lina Kolze, Louisa Kolze, Percy V. Castle, Trustee, and Arista B. Williams, Successor in Trust.

(Endorsed:) Filed Aug. 2, 1904. Marshall E. Sampsell, clerk.

60 NORTHERN DISTRICT OF ILLINOIS, Northern Division, } ss:

I, Marshall E. Sampsell, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court and made in accordance with stipulation and præcipe filed in the cause entitled Charlotte E. Hoadley, complainant *vs.* Abraham L. Day, Charles E. Stade, trustee, Frank

Stade, successor in trust, Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, Lina Kolze, a widow, Louisa Kolze, a spinster, Percy V. Castle, as trustee, Arista B. Williams, as successor in trust, defendants, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district this 16th day of August, 1904.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL, Clerk.

61 UNITED STATES OF AMERICA, *ss:*

To Charlotte E. Hoadley, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal entered and filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Fred H. Kolze, administrator of the estate of Friedrich Kolze, deceased; Lina Kolze, Louisa Kolze, Percy V. Castle, as trustee and Arista B. Williams as successor in trust, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said order mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Christian C. Kohlsaat, district judge, this second day of August, in the year of our Lord one thousand nine hundred and four.

KOHLSAAT, Judge.

62 [Endorsed:] No. 25192. Supreme Court of the United States. Hoadley *vs.* Kolze *et al.* Citation to the Supreme Court of the United States. Circuit court of the United States, northern district of Illinois, northern division. Filed Aug. 9, 1904. Marshall E. Sampsell, clerk.

Service of the foregoing citation accepted and copy thereof received this 9th day of August A. D. 1904, without prejudice to the right to object that said citation was not issued in apt time after the appeal in said cause.

CHARLOTTE E. HOADLEY,
By HERMAN W. STILLMAN,
Her Solicitor.

Endorsed on cover: File No. 19,463. N. Illinois C. C. U. S. Term No. 91. Fred H. Kolze, administrator of the estate of Friederich Kolze, deceased, Lina Kolze, Louisa Kolze, *et al.*, appellants, *vs.* Charlotte E. Hoadley. Filed September 2d, 1904. File No. 19,463.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 23 1905
JAMES H. McKENNEY,
Clerk.

(19463)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 91.

FRED H. KOLZE, Administrator of the estate of Friedrich Kolze, deceased; LINA KOLZE; LOUISA KOLZE et al.,
Appellants,

vs.

CHARLOTTE E. HOADLEY,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

JOHN T. RICHARDS,
SOLICITOR FOR APPELLANTS.

BARNARD & MILLER, PRINT, CHICAGO.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 91.

FRED H. KOLZE, Administrator of the estate of Friedrich Kolze, deceased; LINA KOLZE; LOUISA KOLZE et al., *Appellants* vs. CHARLOTTE E. HOADLEY, *Appellee.*	Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

MAY IT PLEASE THE COURT:

This suit was brought in the Circuit Court by the complainant, Charlotte E. Hoadley, stated to be a citizen of Massachusetts, against the defendants, all of whom were at the commencement thereof citizens of Illinois, for the purpose of foreclosing three trust deeds, each securing the payment of three promissory notes, each for six hundred ($600.00) dollars, in all fifty-four hundred ($5,400.00) dollars, given by Abraham L. Day, a citizen of Illinois.

The Amended Bill filed November 20, 1903, after setting forth that the complainant was a citizen of Boston, and the defendants all citizens of Cook County, Illinois, alleges (Original Rec., p. 4) that

on November 15, 1897, one Friedrich Kolze, a resident of Cook County, Illinois, was the owner of certain premises in Cook County Illinois, thereinafter described; that while he was such owner he and his wife, by warranty deed conveyed said premises, and other property, to Abraham L. Day, at a stated consideration of forty-five thousand ($45,000.00) dollars, which deed was duly acknowledged and recorded (Rec., p. 4½); that as part consideration for said conveyance said Kolze was to receive one thousand ($1,000.00) dollars in cash, a portion of which was in fact paid, and the balance in notes secured by trust deeds on various parts of premises so sold; that to secure a portion of such purchase price said Abraham L. Day executed and delivered his nine principal promissory notes dated November 17, 1897, payable to the order of himself and by him endorsed, for the sum of six hundred ($600.00) dollars each, with interest at seven per cent per annum, copies of said notes being attached to said amended bill (Rec., p. 5); that to secure the payment of said notes the said Abraham L. Day, a bachelor, made and executed three certain trust deeds to Charles E. Stade, as Trustee, conveying certain premises (describing them); that said trust deeds were duly acknowledged and recorded, copies of the same being attached to said amended bill of complaint; that each of said trust deeds provided that if default be made in the payment of said notes, or in case of waste or non-payment of taxes, or breach of covenants therein contained, the whole of said principal sum might, at the option of the legal holder, become immediately due and payable, and said Trustee might take possession of said premises, collect the rents therefrom

and file a bill or bills in any court having jurisdiction for the foreclosure of the same; that out of the proceeds of sale under such foreclosure, the costs of suit, including solicitors' fees, and expenses of said trust, should first be paid, and the balance applied toward the payment of said notes. (Rec., p. 9 and 10.)

Said amended bill further alleged that the said sale and conveyance by Kolze to Day, was negotiated by said Stade, a nephew of said Kolze; that at the date of said sale, and for a long time subsequently thereto, Kolze had confidence in said Stade, and trusted him implicitly in the transaction referred to; that after the recording of said warranty deed from Kolze to Day, and the execution by Day of said nine notes and three trust deeds, the said Kolze was then the owner of said notes and trust deeds, and as such owner entrusted the same, which were negotiable by delivery, to said Stade, his trusted agent, for safe keeping (Rec., p. 11); that while the same were in the custody of said Stade as agent of Kolze, but with all the indicia of ownership, said complainant, Charlotte E. Hoadley, advanced or secured to be advanced a large sum of money upon the note of Stade, secured to be paid by the pledge of said nine notes and three trust deeds, as collateral security therefor; that the note of said Stade was not paid in whole or in part, and that said collateral was thereafter sold under the terms of said collateral note, and was bid in by and became the property of said complainant, so that she was then the legal owner and holder thereof; that after the execution of said notes and trust deeds securing the same, by said Day, he, said

Day, reconveyed said premises to Kolze (Rec., p. 12); that thereafter, by release deed duly acknowledged and recorded, said Stade, Trustee, fraudulently released said three trust deeds to said Kolze, said release deed reciting that the same was made for and in consideration of one dollar and other valuable considerations; alleges that the indebtedness secured by said trust deed and evidenced by said notes had not been paid or canceled; that said release deed was fraudulent, and should be decreed to be void as against said complainant as owner of said notes and trust deeds; that the same should be set aside and said three trust deeds declared to be valid liens upon said premises, and that unless said trust deeds be set aside the amount of said securities would be lost to said complainant. (Rec., p. 13.)

Said amended bill further alleges that about the time of the execution and delivery of said release deed by said Stade, the said Kolze and wife made, executed and delivered their certain warranty deed conveying said premises and other property to the defendant Louisa Kolze, a daughter of grantors, at an expressed consideration of twelve thousand ($12,000.00) dollars; that said grantee was not a *bona fide* purchaser, but that said conveyance was made to her to hold for the benefit of the family; that she was chargeable with notice of the facts thereinbefore stated and took whatever interest she acquired in said premises subject to the lien of said trust deeds securing the notes held by said complainant; that thereafter, for the ostensible purpose of securing the payment of part of the purchase money, said Louisa Kolze made, executed and de-

livered to said Friedrich Kolze her promissory note for ten thousand ($10,000.00) dollars, secured by trust deed to Percy V. Castle, as Trustee, and Arista B. Williams, as successor in trust (Rec., p. 14) which trust deed was duly acknowledged and recorded; that the defendant Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, is the owner and holder of said note and trust deed, but that such interest is in all respects subject to the rights of said complainant.

Said amended bill further alleges (Rec., p. 15) that said complainant has under the option granted her in said trust deed, on the date of the commencement of said suit, declared said notes to be due and payable, and that there is due to said complainant the full amount of said notes and interest thereon; that there is due the further sum of three hundred ($300.00) dollars as solicitors' fees; that complainant is without remedy save in a court of equity, and asks that defendants be required to answer, that said release deed be declared fraudulent and set aside, that the rights of all the defendants be declared to be in all respects subject to the rights of said complainant; that a receiver be appointed and an accounting taken (Rec., p. 16); and the defendants be decreed to pay whatever sum should be found to be due; that in default of such payment said premises be sold; that execution issue for any balance remaining due complainant after such sale; that the defendants be forever barred and foreclosed of all right and equity of redemption in said premises; that such other relief be granted as equity might require and that summons issue for said defendants. (Rec., p. 17.)

Certain of the defendants, now the appellants in this court, appeared and filed their written motion (Rec., pp. 28 and 29) to have dismissed said amended bill for want of jurisdiction, as apparent from original bills of complaint, and from said amended bill, because it did not appear either from said original bills or from said amended bill that the proper diversity of citizenship existed at the commencement of said suits, thereafter consolidated, between Friedrich Kolze, alleged in said amended bill to have been the original owner of said notes and trust deeds, or said Charles E. Stade, therein alleged to be his trusted agent in the premises, the assignors of said complainant, and the defendants, or any of them, so as to confer jurisdiction upon said Circuit Court; which said motion was thereafter overruled (Rec., p. 30) and defendants given leave to elect whether to stand by said motion or plead to said amended bill; that thereafter said defendants filed their plea to said amended bill, which set forth (Rec., p. 32) that said court ought not to take cognizance of said amended bill of complaint, because they, said defendants, and said defendant Abraham L. Day, were at the time of the filing of the bills of complaint in said suits, thereafter consolidated, and at the time of the filing of said plea still were, each and all citizens of the State of Illinois; that said suit was brought by said complainant as assignee of one William P. Smith, who had theretofore obtained said notes and trust deeds from defendant Stade, to recover the contents of certain choses in action, namely, the promissory notes of said Day, secured by said trust deeds to Stade; that said complainant did not advance a large

sum of money upon the note of said Stade, alleged to have been the trusted agent of said Kolze, secured to be paid by the pledge of said notes and trust deeds as collateral security therefor, as in said amended bill alleged; that on the contrary, the said notes and trust deeds signed by said Day were deposited by said Stade with said William P. Smith or other person acting for him, to secure the payment of a note for one thousand ($1,000.00) dollars signed by Stade, payable to the order of said Smith, and also to secure said Smith for the faithful performance by Stade of a certain contract of employment; that upon the failure of said Stade to pay said note and carry out said contract, the said nine notes and three trust deeds signed by said Day, were thereupon bid in and became the property of said complainant; that said Stade and Smith, the successive assignors of said complainant, were each and both at the time of the filing of said bills, and still were at the time of filing said plea, citizens of the State of Illinois, the same state of which said Day, the maker of said notes and trust deeds, was a resident, and were not citizens of the State of Massachusetts (Rec., p. 33); that said suit to recover the contents of said choses in action, to wit, said promissory notes and trust deeds signed by said Day, could not have been prosecuted by said Stade or said Smith, in said Circuit Court of the United States, if no assignment or transfer of the same had been made; said plea concluding by praying judgment whether said defendants should be compelled to make any further answer to said amended bill.

The Circuit Court held said plea insufficient, and

the defendants were ruled to answer said amended bill (Rec., p. 35), but failing to answer they were defaulted (Rec., p. 38) and a decree was thereafter entered by which the court found (Rec., p. 39) that it had jurisdiction of the parties to said cause, and of the subject-matter thereof; that the material allegations in said amended bill of complaint were true; that the notes and trust deeds described in said bill were duly executed; that said Stade, as trustee, had fraudulently and wrongfully released said trust deeds; ordered the release deed set aside as to said trust deeds, and declared said trust deeds to be valid first liens upon the premises therein described (Rec., p. 40); found that the rights of Louisa Kolze, subsequent grantee under warranty deed from Friedrich Kolze, and of Fred H. Kolze as administrator of the estate of Friedrich Kolze, deceased, owner of said promissory note for ten thousand ($10,000.00) dollars, secured by trust deed to Percy V. Castle, Trustee, were in all respects subject and subsequent to the rights of said complainant, as the owner of said notes and trust deeds signed by Day (Rec., p. 41.) The decree then found the amount due said complainant as owner of said notes and trust deeds, and provided that unless the same should be paid within five days from the entry of said decree, said premises should be sold, and the proceeds, after the payment of court costs, be applied toward the payment of said indebtedness, and directed that unless redemption should be made from said sale according to the laws of the State of Illinois, a master's deed should be executed and delivered to the legal holder of the certificate of sale, and that the defendants be

forever barred and foreclosed from all equity of redemption and claim in said land. (Rec., p. 48.)

Upon the entry of said decree the defendants who had sought to have said bill dismissed, filed their petition for appeal and assignment of errors (Rec., p. 49) solely on the question of jurisdiction, which was granted (Rec., p. 51), and afterward perfected said appeal by filing their certain appeal bond (Rec., p. 55), which was thereafter duly approved (Rec., p. 57.) It was stipulated (Rec., p. 52) as to what portions of the record should be transcribed and filed in and certified to this court; which stipulation contained the agreement of the parties to the suit that the original bills of complaint in said cause contained no other or different jurisdictional matters than were contained in the said amended bill of complaint. Rec., p. 53.)

SPECIFICATION OF ERRORS.

The Circuit Court erred,

I.

IN OVERRULING THE WRITTEN MOTION TO DISMISS THE AMENDED BILL OF COMPLAINT FOR WANT OF JURISDICTION. (Rec., p. 31.)

II.

IN HOLDING THE PLEA OF THE DEFENDANTS TO THE JURISDICTION TO BE INSUFFICIENT (Rec., p. 35); and

III.

IN ENTERTAINING JURISDICTION OF THE PARTIES AND SUBJECT-MATTER, AND ENTERING A FINAL DECREE ON THE MERITS. (Rec., p. 36.)

BRIEF.

* * * "Nor shall any Circuit nor District Court have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

1 Sec. Act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act of August 13, 1888, c. 886, 25 Stat. 433.

This section has received the following construction:

"The Circuit Court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees, except over (1) suits upon foreign bills of exchange; (2) suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made, and (3) suits upon choses in action payable to bearer and made by a corporation."

Newgass v. *New Orleans,* 33 Fed. Rep., 196.

New Orleans v. *Quinlan,* 173 U. S. Rep., 191.

Foster's Federal Practice, 3 ed., vol. 1, p. 82.

The phrase "suits to recover the contents of a chose in action" includes suits to foreclose mortgages.

Black on Mortgages, p. 567.
Foster's Fed. Prac., vol. 1, p. 83.

"Hence when mortgagor and mortgagee are citizens of same state, an assignee of the mortgagee, though a citizen of another state, cannot maintain a bill for foreclosure in the federal courts."

Black on The Law of Mortgages and Deeds of Trust, p. 567, citing:
Sheldon v. *Sill*, 8 How. (U. S.) 441;
Shoecraft v. *Bloxham*, 124 U. S., 730;
Blacklock v. *Small*, 127 U. S., 96;
Hill v. *Winne*, Fed. Cases, No. 6503.

"Where federal jurisdiction is dependent upon the citizenship of the plaintiff's assignor at time of commencement of suit, the citizenship of the latter must affirmatively appear somewhere in the record."

Robertson v. *Cease*, 97 U. S., 649.
Anderson v. *Watt*, 138 U. S. 702.
North American Trans. Co. v. *Morrison*, 178 U. S., 267.

The defect is ground for a motion to dismiss at any stage of the proceedings.

Florida Cent. R. R. Co. v. *Bell*, 176 U. S., 327.
Blackburn v. *Portland Gold M. Co.*, 175 U. S., 574.
Municipal Ins. Co. v. *Gardiner*, 62 Fed. Rep., 954.

But the court should of its own motion dismiss the suit whenever it discovers the defect.

N. Amer. Trans. Co. v. *Morrison,* 178 U. S., 267.

"If in any suit commenced in a circuit court, or removed from a state court to the Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

Act of 1875, 18 U. S. Stat. at Large, 472, c. 137.

The dismissal in accordance with the above section may be ordered upon motion of the defendant or by the court of its own motion.

Wetmore v. *Ryder,* 169 U. S., 120.

Nashua, etc., Ry. Co. v. *Boston,* 136 U. S., 356, 374.

Mexican Cent. R. R. Co. v. *Pinkney,* 149 U. S., 200.

Lake Co. Commrs. v. *Dudley,* 173 U. S., 243.

The design of the act of 1875 was to impose a peremptory duty to dismiss whenever it is properly made to appear that the court has no jurisdiction.

Lake Co. Commissioners v. *Dudley,* 173 U. S., 243.

Morris v. *Gilmer,* 129 U. S., 315 (325).

Anderson v. *Watt,* 138 U. S., 694.

It is the duty of the Supreme Court on appeal to see that the jurisdiction of the Circuit Court has in no respect been imposed upon.

Morris v. *Gilmer, supra.*

Nashua, etc., Ry. v. *Boston, supra.*

ARGUMENT.

It is contended by appellants:

I.

THAT THE COMPLAINANT IS AN ASSIGNEE OF A CHOSE IN ACTION WITHIN THE MEANING OF THE FIRST SECTION OF THE ACT OF MARCH 3, 1887, AS CORRECTED BY ACT OF AUGUST 13, 1888.

II.

THAT THE CIRCUIT COURT WAS BOUND, EITHER ON MOTION OF THE DEFENDANTS OR OF ITS OWN MOTION, TO DISMISS THE SUIT WHENEVER THE WANT OF SUFFICIENT JURISDICTIONAL AVERMENTS IN COMPLAINANT'S PLEADING WAS MADE TO APPEAR, AND THAT UPON ITS FAILURE SO TO DO, IT IS THE DUTY OF THIS COURT, ON APPEAL, TO THUS DISMISS IT.

III.

THAT THE SUIT IS NOT, IN EFFECT, ONE BROUGHT BY THE ENDORSEE OF NOTES AGAINST THE ENDORSERS, WITHIN THE MEANING OF THE DECISIONS RELIED ON BY APPELLEE AND HEREINAFTER REFERRED TO.

I.

Charlotte E. Hoadley, the complainant below, a citizen of Massachusetts, filed this suit against Abraham L. Day and others to recover the amount of Day's nine promissory notes by foreclosure and sale of real estate under the three trust deeds securing them. She alleges (Rec., p. 11) that Friedrich Kolze, previously stated to have been a resident of Illinois on November 15, 1897 (Rec., p. 4½), was the owner of the three trust deeds and nine notes given by Day; that Kolze intrusted them to his agent, Stade; that while the same were in the custody and keeping of Stade, with all the indicia of ownership, complainant advanced or caused to be advanced a large sum of money upon the note of Stade, secured by a pledge of the above-mentioned notes and trust deeds of Day as collateral, and that upon the failure of Stade to pay his note, the collateral, i. e., the notes and trust deeds sought to be foreclosed, were sold and bid in by complainant, who brings the suit as the legal holder and owner thereof. In other words, complainant on her own statement is the purchaser of the interest of Kolze, who, she alleges, originally owned the notes and trust deeds, and is not herself the first holder of these securities, the payment of which she seeks to enforce in this suit, for it was not until April 21, 1899, that she became the owner of them (Rec., p. 33), and they were executed by Day on or about November 17, 1897 (Rec., p. 18.) In whose possession were they during this period of nearly a year and a half? By referring to the

Amended Bill, we see that it was on February 17, 1898, that the notes and trust deeds were pledged by Stade (Rec., p. 11), and upon reading the plea we find that on that date he obtained a loan of one William P. Smith for one thousand ($1,000.00) dollars, giving Smith his collateral note for that amount, with which he deposited the nine notes and three trust deeds of Day as collateral (Rec., p. 32.) Complainant, it seems, had advanced the money to Smith. From that date until April 21, 1898, Smith, as pledgee, held the legal title to the collateral, subject to its being divested by payment of the note which it secured. But Stade did not pay the note to Smith, and the collateral was sold and was purchased by complainant. Thus it is evident that four persons, three of them by assignment, successively had title of some kind to these securities, viz.: (1) Kolze, the original owner; (2) Stade, his agent, who had possession of them with all the indicia of ownership, as complainant says (Rec., p. 11); (3) Smith, the pledgee, who might have maintained an action to collect them, and (4) Mrs. Hoadley, the complainant. And not from one of the first three, all her assignors, could complainant have derived the right to commence suit in the Circuit Court for they were all citizens of the State of Illinois, as was Day, the maker.

It will be observed that the section of the statute quoted above as enacted March 3, 1887, is substantially the same as the original section of the Judiciary Act of 1789, in force when the case of *Sheldon* v. *Sill,* hereinafter referred to, was decided, except that the present act contains the additional exception, not applicable here, in regard to choses in ac-

tion payable to bearer and made by a corporation. Both the original Judiciary Act and the present act restrain Circuit Courts from taking cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action in favor of any assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made.

But on March 3, 1875, Congress enacted a new act which provided that "no Circuit * * * Court shall have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, *except in case of promissory notes, negotiable by the law merchant.*" This excepted all suits on all negotiable instruments, whereas the original Judiciary Act and the Act of 1887, now in force, excepts only suits on foreign bills of exchange. The Act of 1875 remained in force until March, 1887, and during that period of twelve years were decided the cases of *Tredway* v. *Sanger*, 107 U. S., 323; *Allen* v. *McDonald* (C. C.), 28 Fed., 17; *Mersman* v. *Werges*, 112 U. S., 139, and *Seckel* v. *Backhaus*, Fed. Cases, No. 12,599 (7 Biss., 354), all of which hold that the Circuit Court *did* have jurisdiction of a suit between citizens of different states to foreclose a mortgage made to secure payment of a negotiable promissory note of which the plaintiff was indorsee, even though the payee and mortgagee was a citizen of the same state with the mortgagor at the commencement of the suit. But these cases, of course, have no bearing in construing the present act, the meaning of which has, however,

been very clearly set forth in the cases of *Newgass* v. *New Orleans,* 33 Fed. Rep., 196, and *New Orleans* v. *Quinlan,* 173 U. S. Rep., 191.

In *Sheldon* v. *Sill,* 8 Howard (U. S.), 441, decided when the act in force regulating the jurisdiction in suits of this character was substantially as at present, Mr. Justice Grier, in delivering the opinion of the court said:

"In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond and is discharged by its payment. It is, in fact, but a special security, or lien, on the property mortgaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general, the other special. The decree is that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the complainant have further remedy, by execution, for the balance. The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the 'assignee of a chose in action' within the letter and spirit of the Act of Congress under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not."

That reasoning certainly applies with all its force to this case. Neither Kolze nor Stade nor Smith, all citizens of Illinois, could have brought the suit in the Federal Court against Day and the other defend-

ants, because all were citizens of Illinois. It is nowhere alleged, nor has it been claimed, that complainant was either *beneficially or equitably entitled* to the contents of the notes and trust deeds at their inception, and, therefore, if she was the owner at the commencement of the suit, it must have been as assignee, and as her assignor, whether he was Kolze or Stade or Smith, could not have brought the suit in the Circuit Court, neither could she.

In *Hill* v. *Winne,* Federal Cases No. 6503, also a foreclosure, the suit was dismissed for want of jurisdiction, because complainant's assignor was a citizen of the same state as were the defendants.

It has been argued by counsel for appellee in the court below, and doubtless will be here, that this suit is not primarily to recover the contents of promissory notes, but to remove the cloud of the alleged fraudulent release. Why, then, did complainant pray for all the relief ever asked in a foreclosure suit?

Just such a contention was made in the case of *Blacklock* v. *Small,* 127 U. S., 96, where, as here, the mortgage had been released and it was claimed the mortgagee had violated his duty in making such release, and it was asked that the satisfaction of the mortgage be annulled and set aside and then that plaintiff might have a decree for payment to them by the mortgagor of the amount due, and for a sale of the mortgaged premises. But the court said (p. 104):

> "The bill is clearly one for a decree against Small for the amount of the bond, and for a foreclosure of the mortgage and a sale of the mortgaged premises."

II.

The amended bill states that the notes and trust deeds foreclosed in this proceeding were first owned by Friedrich Kolze (Rec., p. 10), and that complainant advanced money upon and subsequently purchased the same, but does not anywhere state that Friedrich Kolze was at the commencement of the suit a citizen of any other state than Illinois, or that he could have brought the suit in the Federal Court if no assignment or transfer of the notes and trust deeds had been made. In the absence of such an allegation the Circuit Court was utterly without jurisdiction.

It was said by Mr. Justice HARLAN, in the case of *Robertson* v. *Cease*, 97 U. S., p. 649, and reiterated by Mr. Chief Justice FULLER in *Anderson* v. *Watt*, 128 U. S., 703:

> "As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears. In cases where jurisdiction depends upon the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record."

To the same effect is *N. Amer. Trans. Co.* v. *Morrison*, 178 U. S., 267. Nowhere in this record is there any allegation as to the citizenship of Friedrich Kolze, original owner of the notes and trust deeds,

at the commencement of this suit. The defendants' motion to dismiss for want of jurisdiction should, therefore, have been granted. It was not within the court's discretion as to whether under the facts as stated the suit should or should not have been dismissed, but the Act of 1875, from which I have quoted in the brief, requires that in such a case the court *shall* dismiss the suit.

But the Circuit Court having failed to dismiss the suit, it becomes the duty of this court to do so. As was said by Mr. Chief Justice FULLER in *Anderson* v. *Watt, supra,* quoting from the opinion in *Bernards Township* v. *Stebbins,* 109 U. S., 341, 353:

> "It has been the constant effort of Congress and of this court to prevent the discrimination in respect to suits between citizens of the same state and suits between citizens of different states, established by the constitution and laws of the United States, from being evaded by bringing into the federal courts controversies between citizens of the same state."

Just as obnoxious, of course, is a suit, like this, brought by a citizen of one state whose assignor is a citizen of the same state as the defendants.

III.

Counsel for appellee cited in the argument in the Circuit Court the following cases in support of his contention that the suit, in effect, was one brought by the endorsee of notes against the endorsers, and that the citizenship of the endorser governs rather than that of the maker, in determining whether the court has jurisdiction, which cases I shall briefly review.

In the case of *Superior City* v. *Ripley,* 138 U. S., 93, there was a formal written order by the contractors on the city for a portion of the proceeds of the contract; an acceptance of the order by the city, and an agreement in writing by the city to pay the persons named in the contract; and it was on this order and acceptance that the city was sued, and not on the original contract between the city and the drawer of the order. It was held that the acceptance of the order constituted a new contract between the acceptor and payee, to which the drawer was not a party, and that the payees in the order being non-residents, might bring suit directly against the acceptor of the order without regard to the residence of the original contractors. In the case at bar there is no new contract on which suit is brought, but the original contracts, *i. e.,* the notes and trust deeds, are sought to be enforced. The case, therefore, is not in point.

In *Bushnell* v. *Kennedy,* 76 U. S., 387, the jurisdiction of the Circuit Court was sustained on the ground that as the case was removed from the State to the Federal Court, another section of the Act instead of the one herein relied on, governed. Certain remarks of the court as to the construction of the Act in question seem to indicate that a distinction was made between notes, bonds and other written contracts, which might be said to have contents, and claims for damages for breach of contract—that the restriction against the bringing of suits by assignees applies to the former and not to the latter, to which belonged the chose in action sued on in that case. In the case at bar of course the cause of action is by virtue of written contracts, containing promises to pay money.

In the case of *Holmes* v. *Goldsmith*, 147 U. S., 150, upon which much emphasis was laid by counsel, the payee in the notes had advanced no money or property, but had induced three men to sign a note to his order, upon which, after endorsing the same on the day of its date, and waiving demand, notice and protest, he was paid the amount of the note by plaintiffs. Upon this contract of endorsement the suit was brought against the signers of the note without joining the endorser, and it was held that where it is necessary to maintain the jurisdiction of the Circuit Court in an action on a promissory note, to show that the plaintiff, who appeared to be an endorsee or assignee, was in point of fact the payee, it might be done. It was further held that Owens, the nominal payee and endorser, was in legal effect, a maker of the note; that he received the proceeds of the loan effected through the note, and had no right of action against the nominal makers, and having no right of action could not be regarded as an assignor within the meaning of the Judiciary Act. How different from the case at bar, where Kolze, Stade and Smith as pledgee, successively had rights of action, though not in the Federal Courts, against Day, the maker, and consequently must be regarded as complainant's assignors within the meaning of the Judiciary Act. It was only by reason of Day's subsequent conveyance of the land, which in no way affected the notes and trust deeds held by complainant, and complainant's willingness to forego a deficiency judgment against him, that her counsel were enabled to dismiss the suit as to Day (Rec., 37), but of course retaining as a party defendant Louisa Kolze, the then present

holder of the title. Because Day conveyed the premises back to Friedrich Kolze, who thus became in effect the mortgagor, counsel has argued that there is no intermediate party between complainant and Friedrich Kolze, endeavoring in this way to liken this suit to those already referred to between indorsee and indorser, apparently forgetting that it is between Kolze, in his capacity as the first holder and owner of the Day notes, and complainant, that the intermediate parties come in. As a matter of fact, Kolze, and later the administrator of his estate, were parties simply because Kolze owned the trust deed and note afterward given by Louisa Kolze, the subsequent purchaser, and not because complainant claimed any right of action against him on the notes and trust deeds of Day sought to be foreclosed.

So in the case of *Wachusett Nat. Bank* v. *Sioux City Stove Works,* 56 Fed. Rep., 321, it was held that no right of action was ever vested in or belonged to the payee named in the notes; that therefore in transferring the notes to the plaintiff it did not assign a cause of action held or owned by it, but acted simply as the agent of the defendant in procuring the loan; that no cause of action arose on the notes until plaintiff advanced the money thereon, and became an original party to them. But in the case at bar Kolze did have a cause of action on the notes which complainant subsequently acquired for a valuable consideration from Stade and Smith. Complainant here does not and can not contend that she advanced the consideration for which the notes were given, which was part of the purchase price of the

farm. Therefore, the Goldsmith and Wachusett Bank cases are not in point here.

Steele v. *Rathbun*, 42 Fed. Rep., 391.

I believe that this court after careful consideration will reverse the ruling of the Circuit Court, with directions to dismiss the suit for want of jurisdiction, and assess the costs against the appellee here, the complainant in the Circuit Court.

Respectfully submitted,

JOHN T. RICHARDS,
Solicitor for Appellants.

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Clerk.

(19,463.)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

No. 91.

FRED H. KOLZE, Administrator of the Estate of Friedrich Kolze, deceased, LINA KOLZE, LOUISA KOLZE et al.,
Appellants,

vs.

CHARLOTTE E. HOADLEY,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEE.

HERMAN W. STILLMAN,
Solicitor for Appellee.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

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vs.

CHARLOTTE E. HOADLEY, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEE.

MAY IT PLEASE THE COURT:

In appellants' statement, many of the dates, and other particulars which seem necessary to an understanding by this court of the position of the parties, and which have a controlling effect upon the jurisdictional question presented, are omitted. Chronologically arranged, the important facts in the case are as follows:

First: Friedrich Kolze sold and conveyed certain real estate to Day, by deed dated and acknovledged NOVEMBER 15, 1897, and recorded NOVEMBER 23, 1897.

Second: Day executed the trust deeds described in the amended bill, to Stade, as trustee, dated NOVEMBER 17, 1897, acknowledged and recorded NOVEMBER 24, 1897, securing his notes for part purchase money of said premises.

Third: Kolze thereupon entrusted the notes and trust deeds to Stade for safe keeping, the notes being executed by Day to his own order, and by him endorsed in blank.

Fourth: On FEBRUARY 17, 1898, Stade took the notes, and the trust deeds securing the same, and pledged them as collateral security to the note of said Stade, upon which the appellee then advanced or secured to be advanced a large sum of money.

Fifth: By deed dated and acknowledged NOVEMBER 23, 1897, and delivered and recorded JUNE 30, 1898, Day reconveyed said premises to Kolze.

Sixth: By release deed, dated and acknowledged OCTOBER 27, 1898, and RECORDED OCTOBER 29, 1898, Stade, as trustee, released the trust deeds to Kolze, said release deed reciting that the same was made for and in consideration of one dollar, and for other good and valuable considerations, and further reciting that the notes secured thereby had been canceled. (Rec., 40.)

Seventh: By deed dated OCTOBER 29, 1898, Kolze, now deceased, and the appellant, Lina Kolze, his wife, conveyed said premises to the appellant, Louisa Kolze, who was not a *bona fide* purchaser, and who took the premises charged with the lien of said trust deeds.

Eighth: Thereupon Louisa Kolze executed a trust deed, ostensibly to secure Ten Thousand Dollars ($10,000) of part purchase money, to the appellant, Percy V. Castle, as trustee, the appellant, Arista B. Williams, being named as successor in trust, which trust deed was dated October 27, 1898, acknowledged October 28, 1898, and recorded October 29, 1898; the defendant, Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, being the owner of said notes and trust deeds, subject, however, to the rights of the appellee.

Ninth: Subsequently, on or about April 21, 1899, the notes and trust deeds of Day, upon default by Stade in the payment of his note, were sold, in accordance with the terms of the collateral note, and were bid in by, and became the property of, the appellee.

The date of the deed from Day back to Kolze, and of its acknowledgement,—the same as the date of record of the deed from Kolze to Day,—discredits the *bona fides* of the original purchase by Day, and clearly indicates the fact, namely, that the purchase was colorable, so far at least as Day and Stade were concerned, for the purpose of issuing the notes and trust deeds of Day for fraudulent manipulation. It is perhaps only fair to state that in the original transaction Kolze himself appears to have acted in good faith. His subsequent conduct, in procuring the release deed from Stade, and conveying to his daughter, with the evident purpose of evading the lien of the incumbrances, while perhaps entitled to be charitably considered, cannot be justified.

Upon this state of facts, this proceeding was insti-

tuted by the appellee, to set aside the release deed as fraudulent, and to foreclose the incumbrances.

Prior to the filing of the amended bill, with which this record begins, answers were filed by the appellants, to which replications were filed, and the cause was referred to Master in Chancery William M. Booth, who made his report, recommending a decree in favor of appellee, to which report exceptions were filed by the appellants, which were argued and overruled by the court, as appears from the decree. (Rec., 38.)

Thereupon, the amended bill was filed, as shown in this record, more fully outlining the transactions between the parties.

After the filing of the amended bill (the original bill containing no other or different jurisdictional matters), appellants filed their written MOTION TO DISMISS THE SUIT, for the reason alleged, that it does not appear that the proper diversity of citizenship exists between FRIEDRICH KOLZE, alleged in said amended bill to have been the original owner of said notes and trust deeds, "or said CHARLES E. STADE, therein alleged to be his trusted agent in the premises, the assignors" of said appellee, and the defendants or any of them. This motion was overruled February 8, 1904.

On February 25, 1904, the appellants filed their PLEA OF WANT OF JURISDICTION, alleging that said suit was brought by appellee AS ASSIGNEE OF ONE WILLIAM P. SMITH. In this plea appellants set up the hypothecation of the notes by Stade with Smith, or some person acting for him, to secure the note of Stade, and a

certain contract made by him, and that upon the failure of Stade to pay his note and carry out his contract, said mortgage notes and trust deeds signed by Day were sold on or about April 21, 1899, and were bid in by and became the property of the appellee. That said STADE AND SMITH, "the successive assignors" of appellee, were and still are, citizens of Illinois, the same state of which Day was and is a resident.

On April 5, 1904, the plea of appellants was argued, and held by the court to be insufficient, and the defendants were ruled to answer the amended bill. On May 25, 1904, the decree was entered, defaulting the appellants for want of answer, and granting the relief prayed.

It will be noted that in the motion to dismiss, the appellants took the position that KOLZE and STADE were appellee's assignors, while in their plea they claim that STADE and SMITH were her assignors.

Appellee's position is that she derived the notes from KOLZE, through Stade, to whom they had been entrusted, with the indicia of ownership.

STADE was not an assignor of the notes, because he never owned them, or had any interest in them, and could never have brought suit upon them, to recover their contents from Day, the maker. This sufficiently appears from the allegations of the amended bill of complaint. (Rec., 11.)

SMITH was not an assignor, because he also never owned them. He appears, from the plea, to have been interested in having the note and undertakings of Stade satisfied by sale of the collaterals, but the collaterals never became vested in him, and he never

could have maintained an action thereon. His part in the transaction was not mentioned in the amended bill of complaint, nor in the decree entered upon the master's report.

For the purposes of this appeal, the situation of the parties (which is a question of fact, and of legal effect arising from their conduct, apart from the question of jurisdiction), must be assumed to be as alleged in the amended bill of complaint and found by the decree, viz., that the appellee derived the notes and trust deeds from Kolze, who was the only owner of the notes prior to their ownership by the complainant.

KOLZE, however, after the hypothecation of the notes and trust deeds by Stade, had accepted a reconveyance from Day, and had procured a release of said trust deeds, by release deed, which recited that the indebtedness had been paid and the notes canceled. Kolze would certainly be bound by these recitals, and precluded from prosecuting any action against Day.

THEREAFTER, the notes and trust deeds were sold under Stade's collateral note, and became the property of appellee. So that AT AND EVER SINCE, the time that appellee derived title to said notes and trust deeds, no one intervened between the appellee and Day, the maker of the notes, for the reason that no suit could have been brought upon them by Kolze, if they had not been sold under the collateral note, and acquired by appellee, because, as between Day and Kolze the notes had been satisfied.

Furthermore, while Day was made a party defendant as a proper, although not a necessary, party, nevertheless the relief sought, and the relief granted, namely,

the setting aside of the release deed, and the foreclosure of the trust deeds, was sought and granted against Kolze, or those claiming under him with notice of appellee's rights.

Day had no interest in the premises and was dismissed from the suit upon appellee's motion.

No relief was awarded to the appellee against him.

It is a suit by appellee against KOLZE (or those claiming under him with notice), who had acquired the title to the premises, and between whom and the appellee there is no intermediate party.

BRIEF.

I.

"The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal Courts."

In construing the statute in question the courts will look to the spirit of the act, and will consider the real relation of the parties, and if it appears from all the circumstances that the assignment could not have been colorable for the purpose of conferring jurisdiction, then, the reason of the restriction being gone, the jurisdiction of the United States Courts will attach.

Holmes v. *Goldsmith*, 147 U. S., 150.

Farmington v. *Pillsbury*, 114 U. S., 138.

Chase v. *Sheldon Roller-Mills Company*, 56 Fed. Rep., 625.

II.

The restriction against suits by assignees of promissory notes or choses in action in United States Courts, "*unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made*," has reference to diverse citizenship only. No disqualification of the assignor, other than want of diverse citizenship, will prevent suit by the assignee.

Chase v. *Sheldon Roller-Mills Company*, 56 Fed. Rep., 625.

Bowden v. *Burnham*, 59 Fed. Rep. (C. C. A.), 752.

The inability of Kolze, the assignor, to prosecute suit against Day, the maker, by reason of the fact that as between Kolze and Day the debt had been paid, so that Kolze could not have sued in the United States Court, *or in any court,* would not be an element in the disqualification, if any, of Kolze's assignee, under the statute quoted.

III.

The language of the act, above quoted, implies, in order that the denial of jurisdiction at the suit of an assignee shall apply, that, but for the assignment, a claim would exist on the part of the assignor against the original debtor. When a claim would not exist on the part of the assignor, had no assignment been made, the reason of the act will be wanting, and jurisdiction will attach.

Holmes v. *Goldsmith,* 147 U. S., 150.

Wachusett National Bank v. *The Sioux City Stove Works,* 56 Fed. Rep., 321.

Chase v. *Sheldon Roller-Mills Company, supra.*

Jurisdiction depends upon the status of the parties at the commencement of the suit.

Emsheimer v. *New Orleans,* 186 U. S., 33.

In the case at bar, at the commencement of the suit, no action could have been brought upon the notes and trust deeds by any person whomsoever, if no assignment had been made; not for want of diverse citizenship, but because, as between Kolze and Day, the debt had been satisfied and the trust deeds released. Kolze had been eliminated from the transaction as an assignor, within the contemplation of the statutes.

IV.

The Circuit Court of the United States has jurisdiction of a suit brought by the endorsee of a promissory note against his immediate endorser, whether a suit would lie by the endorser against the mortgagor or not, upon the ground that the endorsee does not claim through an assignment, but upon a new contract between himself and the endorser.

Young v. *Bryan*, 19 U. S., 6 Wheat., 146.
City of Superior v. *Ripley*, 138 U. S., 93.

In this case, such a new contract was made when the complainant advanced her money upon the pledge of the mortgages, and that contract is still subsisting until the mortgages shall be realized upon.

Kolze, or those claiming under him, with notice, were the principal defendants, between whom and the appellee no one intervened.

If the presence of Day, an unnecessary party to the foreclosure, prevented the exercise of jurisdiction, which is not conceded, the impediment was removed by his dismissal.

Conolly v. *Taylor*, 27 U. S., 2 Pet., 556.

V.

Under the circumstances of this case the principal relief sought was the setting aside of the release deed. Having jurisdiction for that purpose, the court properly retained it for complete relief.

Ober v. *Gallagher*, 93 U. S., 199.
Deshler v. *Dodge*, 16 How., 622.

ARGUMENT.

I.

THE ACTS RELATING TO SUITS BY ASSIGNEES. THEIR PURPOSE AND CONSTRUCTION.

Three acts have been passed relating to the enforcement of promissory notes and choses in action in the United States Courts, by assignees: namely, the Judiciary Act of 1789 (Section 11); the Act of March 3, 1875; and the Act of March 3, 1887, as corrected by the Act of August 13, 1888.

The provisions of these acts were thus stated by this court in the case of *City of New Orleans* v. *Quinlin*, 173, U. S., 191:

"By the eleventh section of the Judiciary Act of 1789, it was expressly provided that the Circuit Courts could not take cognizance of a suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been, except in cases of foreign bills of exchange. The Act of March 3, 1875 (18 Stat., at L. 470, Chap. 137), provided: 'Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange.' The restriction was thus removed as to 'promissory notes negotiable by the law merchant,' and jurisdiction in such suits made to depend on the citizenship of the parties as in other cases. *Tredway* v. *Sanger*, 107 U. S., 323 (27:582).

By the first section of the Act of March 3, 1887 (24

Stat., at L. 552, Chap. 373), as corrected by the Act of August 13, 1888 (25 Stat., at L. 433, Chap. 866), the provision was made to read as follows: 'Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.' "

In construing these acts, it has been the uniform holding of this court that the acts were designed to prevent the creation of jurisdiction in the United States Courts by the transfer of claims held by a citizen of the same state with the debtor to a citizen of another state, and furthermore that the spirit of the acts will be looked to in determining the question of jurisdiction.

The language of this court in decisions to that effect will be found in subsequent parts of this argument.

II.

LIMITATIONS OF THE RESTRICTION. ITS APPLICATION TO DIVERSE CITIZENSHIP ONLY.

In the case of *Chase* v. *Sheldon Roller-Mills Co.*, 56 Fed. Rep., 625, two notes for $300 and $700 each, had been executed by the defendant, an Iowa corporation, to the order of a Minnesota corporation, and assigned by the latter to the plaintiffs, who were citizens of Missouri. The plaintiffs also held a note for $1,187.10 made by the same maker to their order. These notes were joined in one suit in the United States Circuit

Court for the Northern District of Iowa. The point was made that the assignors of the two notes first mentioned could not have sued in the United States Court, for the reason that the aggregate amount due on said notes was less than 2,000. The court say:

"Literally construed, the language of the statute would seem to deny the jurisdiction, under such circumstances; but under the rule of construction laid down by the Supreme Court in *Holmes* v. *Goldsmith*, *supra*, and the cases therein cited, the true meaning of the restriction is to be sought by an interpretation of the purpose to be effected, and the evil to be remedied."

The court then observes that the restrictions as to amount, and that as to suits by assignees, are wholly separate and distinct; that in the particular of diverse citizenship an action thereon by the assignors would have been within Federal jurisdiction, and that therefore the statutory restriction did not apply. To the same effect is *Bowden* v. *Burnham*, 59 Fed. Rep., (C. C. A.), 752.

In the cases cited, the assignors could not have sued in the United States Courts, by reason of the amount involved. In this case, Kolze, the assignor, could not have sued there, or in any other jurisdiction, because he had satisfied the debt. In both cases, "literally construed, the language of the statute would seem to deny the jurisdiction"; but in the case at bar, as in the cases cited, interpretation of the act with reference to "the purpose to be effected and the evil to be remedied," does not lead to a denial of Federal jurisdiction of a suit by the assignee. In fact, in the cases cited, there would seem to be more reason for a strict interpretation than in this cause, for the reason that

in those cases there might have been a colorable assignment of the notes for the purpose of combining them with other claims in order to bring the cases within the requisite jurisdictional amount; while in the case at bar, there can obviously have been no fictitious transfer, as the assignor, or those claiming under him, are the principal defendants, and the only parties contesting the jurisdiction.

III.

THE NECESSITY OF LIABILITY FROM THE DEBTOR TO THE ASSIGNOR (IF NO ASSIGNMENT HAD BEEN MADE), IN ORDER THAT THE RESTRICTION SHALL APPLY.

It is submitted, moreover, that the language of the act, "unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made," has in contemplation cases where there would exist a liability upon the part of the debtor to the assignor if no assignment had been made; and where, under the allegations of the pleadings, it appears that as between the debtor and the original creditor or assignor, the latter had become eliminated from the transaction by satisfaction by him of the debt, then, there being no possible party intermediate between the original debtor and the assignee, in whose interest the suit might be prosecuted, the reason of the act will be wanting, and the act will not apply.

In the case at bar, Day, the maker of the mortgages, had paid his debt by reconveyance of the property to Kolze. That this is so, is evidenced by the fact that

after accepting the reconveyance Kolze procured a release of the trust deeds from the trustee, and placed the same on record, reciting that the debt had been paid and the notes canceled. That recital, so far as the cancellation of the notes is concerned, was not true, and was not binding upon the appellee, who had acquired the notes. Under the circumstances, Day was not discharged, because he delivered his reconveyance and made satisfaction of the debt to Kolze without taking up his notes. But his liability was not to Kolze. And because Kolze could not have sued Day, had no assignment been made, the act under consideration has no application to this case.

That this is the correct interpretation to be placed upon the act would appear from the opinion of this court in the case of *Holmes et al.* v. *Goldsmith et al.*, 147 U. S., 150. In that case a promissory note had been executed by the plaintiffs in error (defendants below) to the order of one Owens, who endorsed the same to the defendants in error (plaintiffs below), and received the amount thereof. The complaint alleged that Owens, although the payee, was in fact a maker of the note and never himself had any cause of action thereon against the defendants. This court, Mr. Justice Shiras delivering the opinion, say:

"It is quite plain that the plaintiff's action did not offend the spirit and purpose of this section of the Act.

The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal Courts. * * *

In *Bushnell* v. *Kennedy*, 76 U. S., 9 Wall., 387, 391 (19: 736, 738), *Chief Justice* Chase, in delivering the opinion of the court, said: 'It may be observed that

the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee; though it is not to be doubted that the holder's title could only be derived through transfer or assignment. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a *chose in action* may maintain a suit in the circuit court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors.'

We do not overlook the fact that, since the foregoing cases were determined, Congress has, in the more recent judiciary acts, still further restricted the jurisdiction of the circuit courts by including in the prohibitory clause the case of promissory notes payable to bearer.

But the reasoning remains applicable, in so far as they hold that the language of the statute is to be interpreted by the purpose to be effected and the mischief to be prevented.

We think that the jurisdiction of the circuit court, in the case before us, was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his endorsement, assign or transfer any right of action held by him against the accommodation makers."

It is apprehended that the construction would have been the same, no matter by reason of what circumstances the endorser might have had no right of action against the makers.

At the time the mortgages foreclosed in this suit

were sold under the collateral note with which they had been pledged, Kolze had no right of action against the maker, and stands in the identical legal position with Owens, the payee in the note involved in the case above cited. By the negotiation of the instruments, Kolze became a guarantor of their validity until the debt for which they were pledged should be satisfied. After their release or discharge by his procurement, and to himself as the owner of the property by reconveyance from the mortgagor, he became in effect a maker to all intents and purposes, so far as concerns the lien of the mortgages upon the real estate embraced therein.

The case of *Wachusett National Bank* v. *The Sioux City Stove Works*, 56 Fed. Rep., 321, seems also to apply. In that case the defendant company executed notes to the order of the Union Loan and Trust Company, which endorsed them to the order of the plaintiff company, and after receiving the money on them paid it over to the maker of the notes. Under this state of facts, the plaintiff company held as assignee of the notes and under the strict letter of the act could not have maintained the suit. The allegations of the petition disclosed, however, that the transaction was really between the maker and such endorsee, and the jurisdiction of the court was upheld. No right of action existed on the part of the payee against the maker, hence there could have been no colorable assignment and the reason of the restriction was wanting.

The court say:

"There never was a time when the Trust Company could have maintained an action on the notes against the maker thereof, for it never advanced any money

thereon, nor did it ever agree or promise so to do, nor were the notes executed as evidence of an indebtedness arising out of any past transactions. * * * It was the payment of the money by the Wachusett Bank that created a right of action against the defendant, but this right of action never belonged to the Trust Company, and did not pass by assignment from it to the plaintiff bank."

In the case at bar there never was a time since the reconveyance to Kolze and the release of the incumbrances (which occurred prior to the date when appellee acquired the mortgages), when Kolze could have maintained an action on the notes against Day, the maker.

For the reasons above stated, it is submitted that appellee could have pursued Day in this suit, in the United States Circuit Court, to the full extent of his personal liability upon the notes, had she chosen so to do.

IV.

THE RIGHT OF AN ASSIGNEE TO SUE THE ASSIGNOR UPON A NEW CONTRACT.

As a matter of fact, however, all that appellee sought was a foreclosure of the property. Day was dismissed from the suit, and the only relief granted was the foreclosure of the property against Kolze, or those claiming under him. It will be noted that it is not Day who is objecting to the jurisdiction, but Kolze's wife and daughter, and the administrator of his estate. The claim of want of jurisdiction is not invoked by the original debtor, but by the original creditor or those claiming under him. This is a very material fact. The con-

troversy is obviously not between an assignee and the maker, but between an assignee and her assignor. The case would thus seem to be governed by the rule laid down in suits which have arisen, brought by the endorsees of notes against the endorsers. In that class of cases, where the necessary diversity of citizenship exists between the endorsee and the endorser, the jurisdiction of the United States Courts has been uniformly upheld, without regard to whether or not diversity of citizenship exists between the endorser and the maker. In these cases jurisdiction has attached for the reason that by the endorsement, a new contract was made between the endorser and the endorsee; a liability of the endorser to the endorsee apart from any liability of the maker to the endorser upon the original debt, existing without regard to the transactions between the maker and the endorser, and proceeding from the new and different contract between the endorser and the endorsee.

In the case of the *City of Superior* v. *Ripley*, 138 U. S., 93, an action was brought against the City of Superior upon certain orders drawn by contractors in favor of the plaintiffs and accepted by the city. It was contended that the plaintiffs obtained their right to bring suit upon the orders by assignment from the contractors, who were citizens of the same state as the defendant. The acceptance by the city was held by this court to be a new contract, and that the same rule would apply as governs the right of an endorsee of a note to sue his endorser, without regard to diversity of citizenship between the endorser and the maker. This court say:

"Ever since the case of *Young* v. *Bryan*, 19 U. S., 6

Wheat., 146, it has been the settled law of this Court that the Circuit Court has jurisdiction of a suit brought by the endorsee of a promissory note against his immediate endorser, whether a suit would lie against the maker or not, upon the ground, as stated by Chief Justice Marshall, 'that the endorsee does not claim through an assignment, but upon a new contract between himself and the endorser.' "

IN THE CASE AT BAR, KOLZE MADE A NEW CONTRACT WITH THE APPELLEE UPON THE HYPOTHECATION OF THE SECURITIES, NAMELY, THAT THE MORTGAGES PLEDGED AND THE PREMISES EMBRACED THEREIN SHOULD REMAIN AS SECURITY FOR THE DEBT TO THE APPELLEE UNTIL SUCH DEBT SHOULD BE PAID.

After this new contract by the hypothecation of the mortgages, which hypothecation was held by the court to be in effect the act of Kolze, the latter accepted satisfaction of the original debt to him from the maker. After that satisfaction, and the fraudulent release of the incumbrances by the trustee, who was the very man who was permitted by Kolze to negotiate the securities and obtain money upon them from the appellee, the securities were sold under the terms of the collateral note and were bid in by the appellee and taken by her in satisfaction of her just debt,—a debt which, in legal contemplation, existed from Kolze to herself.

As was said by counsel for the defendant in error, in the case of *Young* v. *Bryan*, 19 U. S., 146, which this court has recently followed, as above noted (referring to the language of the Act of 1789 then in force, which was similar to the present law):

"These words necessarily import a recovery by an assignee, claiming through the medium of an assignment, of the same contents which might have been re-

covered by the assignor, if he had not assigned. They apply only to a derivative claim." * * * "The contract," (*i. e.*, of an endorser) "is so entirely independent that the endorsee" (endorser?) "would be liable though the note were forged, or the drawer fictitious. The assignment, it is true, is evidence of the contract, and in a certain sense, the foundation of his claim; but he does not claim through it nor under it, nor does he claim at all as assignee."

In the case at bar, can it be doubted, under the circumstances set up in the amended bill of complaint, that even if Day, the maker of the notes and trust deeds, were a myth, or the notes and trust deeds were forged, they having been negotiated by Kolze, and he having become the owner of the premises embraced in the mortgages, this suit would lie directly against him or his grantee, on the part of appellee, in the United States Courts, to recover the premises by foreclosure? Kolze, in effect, assumed the encumbrances, so far as their lien upon the premises is concerned, and those claiming under him can not now sit back and enjoy the property, and say to the appellee, who has advanced her money on the faith of the mortgages; "You cannot foreclose against us in the United States Courts, because Kolze could not there have sued the maker, *had he not released him from his obligation.*"

Surely it cannot be contended that because he, Kolze, could not sue Day (*whom he had released*), in the United States Courts, that therefore the appellee could not sue him, Kolze, in the United States Courts upon this new undertaking. He reacquired the premises embraced in the trust deeds by conveyance from Day, and he, or his grantee with notice, must respond to the ap-

pellee with those premises to the extent of her debt. That is all that appellee seeks in this case. She voluntarily remitted all that part of the amount due under the mortgages, aggregating $7,569, over and above the amount of her debt or $2,850, to secure which, the securities were pledged. (Rec., 45.)

In assuming jurisdiction to award such relief upon the part of a citizen of Massachusetts against those claiming under Kolze, all of whom are citizens of Illinois, the fact that Day, the maker of the mortgages, was also a citizen of Illinois, and that Kolze could not have sued Day upon the notes in the United States Courts, *if he had not satisfied the debt*, was properly held to be immaterial, and to have no application.

V.

THE JURISDICTION OF THE UNITED STATES COURT TO SET ASIDE THE RELEASE, AND TO RETAIN THE CASE TO GRANT FULL RELIEF.

But apart from the foregoing considerations, it is respectfully submitted that the case at bar is not within the prohibition of the statute, for the reason that it is not a suit primarily to recover the contents of promissory notes. The bill is a bill to remove the cloud of the fraudulent release deed. It was with regard to whether or not the release was fraudulent that the voluminous testimony was taken by the master in the case. Ample relief might have been awarded to the complainant by declaring the release deed fraudulent and reinstating her mortgages. Such relief would not have been a recovery of the contents of the notes.

Chief Justice Marshall in *Sere* v. *Pitot*, 6 Cranch., 332, said that "the contents of a note are the sum it shows to be due"; and in *Barney* v. *Globe Bank*, 5 Blatch., 107, the court say:

"The word contents is easily understood, when applied to these instruments. It designates the specific sums named therein, and payable by the terms of the instruments themselves."

The relief by the removal of the cloud was certainly not a recovery of the amounts payable under the notes; and relief by foreclosure was simply ancillary to such relief.

In *Ober* v. *Gallagher*, 93 U. S., 199, this court held that a suit brought after a judgment had been rendered upon certain notes was not brought to recover the contents of the notes, and a foreclosure of the judgment lien was permitted; the court furthermore drew to itself jurisdiction to decree foreclosure of other notes secured by the same lien.

In *Deshler* v. *Dodge*, 16 How., 632, an action of replevin brought by an assignee of notes, to recover possession thereof, was held to be not a case to recover the contents of the notes, and that it was not within the prohibition of the statute. That case is analogous to the case at bar in this respect: that in the case at bar, by the fraudulent release, the complainant in effect was kept out of the enjoyment of her mortgages, which she must first restore to their legal standing by a decree setting aside the release deed.

The case of *Blacklock* v. *Small*, 127 U. S., 96, upon which appellants rely, in anticipation of this proposition, does not apply, for the reason that in that case the property was still owned by the mortgagor, and

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(19,463.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 91.

FRED H. KOLZE, Administrator of the Estate of Friedrich Kolze, deceased, LINA KOLZE, LOUISA KOLZE et al., *Appellants*,

vs.

CHARLOTTE E. HOADLEY, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

PETITION OF APPELLEE FOR REHEARING.

HERMAN W. STILLMAN,
Solicitor for Appellee.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH STREET, CHICAGO

IN THE

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PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

The appellee very respectfully petitions for a rehearing of this cause upon the grounds hereinafter set forth.

The first and third grounds are by way of suggestion, with a view to a modification of the judgment or decree of this court, in respects which it is thought are not inconsistent with the views of this court on the main question, and which seem just and equitable between the parties.

As to the second ground, the points contained therein

were made on page 5 of appellee's statement of the case, but were not argued at greater length. Perhaps these points should have been amplified and more clearly presented.

First. After the filing of the original bill, which contained no other or different jurisdictional questions than are contained in the amended bill, (as stipulated in this record), the defendants answered, denying the genuineness of appellee's notes, and denying fraud in the release deed. The case was referred to Master in Chancery Booth, who took a large amount of testimony, and who reported upon the issues in favor of the appellee. The master's report was filed May 25, 1903. (Rec., 38.)

The master's fees under that reference were $380, as appears by the decree (Rec., 42), which appellee paid. Exceptions were filed by the appellants upon the merits of the case. Those exceptions were argued before his Honor, Judge Kohlsaat, and were overruled. (Rec., 38.)

Up to this point no question had been raised as to the jurisdiction of the court by anyone connected with the case.

A decree was drafted in conformity with the rulings of the court, upon the presentation of which the defendants filed their motion January 14, 1904, and afterwards filed their plea in the case.

Under these circumstances it seems a great hardship to oblige appellee to go to a state court and make up issues on these same facts concerning the identity of her notes and the fraud in the release.

Appellee respectfully urges that, in any view of the case, even though the appellee were forbidden by the statute to foreclose the incumbrances in the United States Court, her bill should not be dismissed, but she should be permitted to amend the same, if necessary, and to have a decree removing the cloud of the release deed, and establishing her notes as the genuine notes secured by the trust deeds, thus allowing her to conduct a much less expensive suit in the state court in the foreclosure of the incumbrances.

SECOND. As her second ground for a rehearing, appellee most sincerely urges that this court has apparently misapprehended the position of the parties, as affecting the jurisdictional question presented by the record. This court say, in the opinion filed herein (bottom of page 4), that

"It would seem to be immaterial whether the plaintiff derived her title directly from Stade, to whom she had advanced money and afterwards purchased the notes and trust deeds, as alleged in the bill, or through William P. Smith, who had obtained the notes and trust deeds from Stade, his debtor, since both Stade and Smith were citizens of the State of Illinois, and the inhibition of the statute would apply in either case."

And again, (bottom of page 5):

"As the plaintiff is thus compelled to trace her title through Stade or Smith, who are both citizens of Illinois, and neither of whom could have prosecuted this suit, she is affected by the same incompetency."

It is in this view of the derivation of appellee's title either from Stade or Smith, that it is most earnestly submitted that this court has misconceived the true position of the parties. Appellee therefore craves the indulgence of this court, and bespeaks consideration

of the following statement, which is believed to be borne out by the facts of the case and the decisions of this court applicable thereto.

1. *The appellee did not derive her title from Stade, who had no title to give.*

The notes had been entrusted by Kolze to Stade, his agent, endorsed in blank, transferable by delivery, and the act of Stade in pledging them, and the trust deeds securing the same, was, in contemplation of law, *the act of Kolze himself.* His act, being that of a *mere agent,* with no title or ownership in the notes, was the act of Kolze, his principal.

Stade never owned the notes and *could never have prosecuted suit thereon,*—a right and qualification which must have existed in him, in order to affect the appellee, under the letter and reason of the Act upon which appellants rely.

The facts seem governed by the reasoning of this court in *Bank of Pittsburgh* v. *Neal,* 22 How., 96, in which this court say:

"Where the party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carried on its face an applied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody,—or, in other words, *it is the act of the principal,* and he is bound by it."

And as was stated by this court in *Michigan Insurance Company* v. *Eldred,* 9 Wall., 544:

"It is well settled law that where a party to a negoti-

able bill of exchange or promissory note containing blanks, intrusts it to the custody of another, whether the blanks are in the date or the amount of the note, and whether it be for the purpose of accommodating the person to whom it was intrusted, or to be used to raise money for his own benefit, such bill or note, especially if it be endorsed in blank, or is made payable to bearer, carries on its face an implied authority, in the person to whom it is so intrusted, to fill up the blanks in his discretion; and, as between such party to the bill or note and innocent third parties, holding the bill or note as transferees for value, in the usual course of business, the person to whom it is so intrusted must be deemed to be the agent of the party who committed such bill or note to his custody; and the legal conclusion is, that in filling up the blanks he acted under the authority of that party, and with his approbation and consent."

As Stade had no title of his own to give, and as his act, upon this line of reasoning, which would seem to apply, was the act of Kolze, then in legal contemplation *Kolze pledged the papers,* through Stade, his agent, to secure the note of Stade. The appellee did not acquire the title of Stade to the notes upon the sale, because Stade had no title to be acquired. She derived the title of Kolze, who was her assignor, through Stade, his agent.

2. *Appellee did not derive title from Smith.*

In the statement of the case, preceding the opinion (page 1), this court say:

"On February 17, 1898, Stade took the notes and trust deeds securing the same and pledged them to Charlotte E. Hoadley as collateral security to his own notes, upon which Hoadley then advanced, or secured to be advanced, a large sum of money."

With this finding, the recital of the opinion hereinbefore quoted, referring to appellee's tracing title

through *"William P. Smith, who had obtained the notes and trust deeds from Stade, his debtor,"* seems inconsistent. Smith certainly did not obtain the notes from Stade. The appellee certainly did not obtain the notes from Smith.

The only mention of Smith in this record is contained in appellant's plea. But it is not even alleged in the plea that the notes and trust deeds were deposited with William P. Smith, or that he sold or assigned them to the appellee. The allegation is that they were deposited with him, *or some person or persons acting for him,* to secure Stade's note payable to the order of Smith, "and also to secure said William P. Smith for the faithful performance by said Stade of a certain contract"; it does not allege that Smith then owned the note of Stade for $1,000, or that it was not owned by the appellee; it alleges that Stade failed to pay the note, but it does not say *to whom,* and failed to carry out his contract, and that Smith *caused* the collaterals to be sold. The plea recites, it is true, that said suit is brought by plaintiff "as assignee from one William P. Smith," and it refers to Smith, by way of recital, as the assignor of plaintiff, but it does not state of what, and it does not state facts showing *how* Smith was her assignor of anything, or *how* the plaintiff acquired the notes from Smith. The allegations are mere conclusions of the pleader, and from the entire plea taken as a whole it can only be inferred that Smith had some interest in the pledge of the collaterals, but nothing more.

Furthermore, the "plea" is not supported by the affidavit of a defendant that the same is true in point of fact, as required by equity rule 31, and it is submitted

that it amounted to nothing more than a further motion or suggestion to the court that the court had no jurisdiction.

It is believed to be well settled that the want of certificates of counsel ~~are~~ held to have been waived by setting down a plea and demurrer thereto, for argument as to the sufficiency of the plea; but a careful search of the decisions has revealed no case holding that the want of an affidavit *to the truth* of a plea setting up matter *in pais*, required not only by the rules, but by general chancery practice, can be waived.

The rule in that behalf is thus stated in Daniel's Ch. Prac., *688:

"Where a plea which ought to be upon oath is put in without one, the irregularity is not one which can be waived by the plaintiff's taking any proceeding upon it." Citing

Wall v. *Stubbs*, 2 V. & B., 354, 358.

In that case the plaintiff set the unverified plea for argument. It was argued that the plaintiff was under the necessity of setting down the plea within eight days, otherwise he would have admitted its validity. The court say:

"The second point, that the plaintiff, having taken a step, recognizing the plea as regular, by setting it down to be argued, has waived this objection, is put thus; that this rule, requiring the plea to be put in upon oath, is entirely for the benefit of the plaintiff; who, if that is so, may certainly waive it; and this is compared to the case of a plaintiff abroad, required to give security for costs; but a plea of this nature stands precisely upon the footing of an answer. In both instances the oath of the defendant is for the benefit of the plaintiff certainly, but is also prescribed by the established course of the court, if not dispensed

the relief sought was evidently a decree against him, for the recovery of the debt. Furthermore, a part owner of the mortgage, a citizen of the same state as the mortgagor, and who should have been a complainant, was made a defendant. In the case at bar, no relief was sought against the mortgagor, as evidenced by his dismissal from the suit, and substantial relief might have been awarded by the removal and setting aside of the release deed, as against the grantee of Kolze, with notice, without the ancillary relief of foreclosure which was properly granted.

We submit that in any view of this suit it does not come within the spirit or intendment of the prohibition contained in the act upon which the motion and plea were based, and that the Circuit Court properly entertained jurisdiction to grant the relief accorded by the decree.

Respectfully submitted.

HERMAN W. STILLMAN,
Solicitor for Appellee.

And again, in Sec. 635 of the same work, considering the question of the sale, the author says:

"A pledgee cannot directly or indirectly purchase at a sale of the pledge under a power, unless it is specially provided by the terms of the power that he may do so. Nothing passes by the form of a sale, and the pledgee still holds the property, under his original lien as collateral security. *The title is still in the pledgor* and the pledgee is still liable to account for the property and to deliver it upon payment of the debt."

Smith's right in the notes and mortgages, even had they been pledged to him, would have been a lien thereon, which would have been enforced by the sale of the collaterals under the power contained in the collateral note. But at that sale, even if made by Smith, the purchaser would not have derived title to the notes and trust deeds from Smith, who would have sold them merely in the enforcement of his lien, as the agent or attorney in fact for the real owner. He would not be selling *his interest* in the notes and trust deeds, which would merely substitute the purchaser in his position as pledgee or lienor. He would be selling the interest of the owner. He would not sell the interest of Stade, because Stade had no interest. He would sell the interest which Stade was enabled to pledge by his possession of the securities, which was the interest of Kolze. So that at such a sale appellee would have purchased the interest of Kolze.

Stade and Smith, in any construction of the facts of this case, are not in the transaction as owners of the notes and trust deeds or as assignors, because the title never passed through them. In legal effect, appellee derived the notes directly from Kolze, to all intents and purposes as though she had met him face to face and

purchased the securities from him by paying cash therefor.

THIRD. Appellee urges that under the circumstances of the case and appellants' delay in objecting to the jurisdiction, it is a hardship to compel the appellee to pay the costs of the litigation, and the costs should be taxed against appellants.

And, for the reasons aforesaid, appellee petitions for a rehearing.

Respectfully submitted,

HERMAN W. STILLMAN,

Solicitor and of Counsel for Appellee.

I, the undersigned, solicitor and of counsel for the appellee, do hereby certify that in my opinion the foregoing petition for rehearing is well founded in point of law, and is not made for the purpose of delay.

HERMAN W. STILLMAN,

Solicitor and of Counsel for Appellee.

Supreme Court of the United States.

No. 91.—October Term, 1905.

Fred H. Kolze, Administrator, etc., et al., Appellants, *vs.* Charlotte E. Hoadley.	Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[January 2, 1906.]

This was an appeal from a decree of the Circuit Court in favor of the plaintiff, Charlotte E. Hoadley, a citizen of Massachusetts, against Abraham L. Day and other defendants, among whom were Fred H. Kolze, administrator of the estate of Frederich Kolze, deceased; Lina Kolze, his widow; Louisa Kolze, his daughter, and Charles E. Stade, trustee, all citizens of Illinois, foreclosing three trust deeds given by Day to secure promissory notes in the aggregate amount of $5,400. The appeal was granted solely upon the question of jurisdiction.

The point involved requires a statement of facts at some length. They are substantially as follows:

Frederich Kolze sold and conveyed certain real estate to Day by warranty deed dated and acknowledged November 15, 1897, for a stated consideration of $45,000, namely, $1,000 in cash and the remainder in notes secured by trust deeds. To secure such notes Day executed three trust deeds to one Stade as trustee, conveying the real estate in question, which were dated November 17 and acknowledged and recorded November 24, 1897. Kolze thereupon intrusted the notes and trust deeds to Stade, a nephew, in whom he seemed to have great confidence, the notes being executed by Day to his own order and by him indorsed in blank.

On February 17, 1898, Stade took the notes and trust deeds securing the same and pledged them to Charlotte E. Hoadley as collateral security to his own notes, upon which Hoadley then advanced, or secured to be advanced, a large sum of money.

By deed dated and acknowledged November 23, 1897, but not delivered or recorded until June 30, 1898, Day reconveyed the premises to Kolze, and by deed of release, dated and acknowledged October 27, 1898, and recorded October 29, 1898, Stade as trustee fraudulently released said three trust deeds to Kolze, reciting a consideration of one dollar and other valuable considerations, and further reciting that the notes secured thereby had been cancelled.

By deed dated October 29, 1898, Kolze, now deceased, and the appellant, Lina Kolze, his wife, conveyed said premises to Louisa Kolze, their daughter,

upon an expressed consideration of $12,000, although the grantee was not a *bona fide* purchaser, and said conveyance was made to her to hold for the benefit of the family.

For the ostensible purpose of securing the payment of the purchase money, said Louisa Kolze executed a trust deed to secure her promissory note of $10,000, to Percy V. Castle, as trustee. This deed was dated October 27, 1898, acknowledged October 28, 1898, and recorded October 29, 1898, the appellant Fred H. Kolze, as administrator of the estate of his father, being the owner of said notes and trust deeds, subject, as was alleged, to the rights of the plaintiff Hoadley.

Subsequently, on or about April 21, 1899, the notes and trust deeds of Day, upon default by Stade in the payment of his note, were sold in accordance with the terms of the collateral note, and were bought in by and became the property of the appellee Hoadley.

The bill prayed that the release deed executed by Stade to Fredrich Kolze be declared fraudulent and void as against the notes and trust deeds executed by Day and now owned by the plaintiff; that the rights of all the defendants be declared subject to those of the plaintiff under the notes and deeds held by her; that a receiver be appointed and an account had, and the defendants be decreed to pay whatever was due under the notes and trust deeds, and in default thereof that the premises be sold and the defendants be held liable for any deficiency upon such sale, and that they all be foreclosed of their right of redemption.

The defendants moved to dismiss the amended bill for want of a proper allegation of diversity of citizenship, which was overruled; and thereupon defendants interposed a plea to the jurisdiction upon the ground that the defendants were all citizens of the State of Illinois; that the suit was brought by plaintiff as the assignee of one William P. Smith, to whom the notes had been hypothecated by Stade to secure his, (Stade's) note, and also to secure Smith for the faithful performance by Stade of a certain contract of employment; that upon the failure of Stade to pay his note and carry out his contract said mortgage notes and trust deeds signed by Day were sold on or about April 21, 1899, and were bought in by and became the property of the plaintiff; that Stade and Smith, "the successive assignors" of the appellee, were citizens of the State of Illinois, the same State of which Day, the maker of the notes was also a resident, and that by reason of the fact that said suit could not have been prosecuted in a Federal Court, if no transfer or assignment had been made, the Circuit Court had no jurisdiction of the case.

This plea was held to be insufficient, and the defendants failing to answer, were defaulted, and a decree thereafter entered to the effect that Stade as trustee had frandulently released the trust deeds; that the trust deeds

were valid as liens upon the premises; that the rights of Louisa Kolze, subsequent grantee under the warranty deed, as well as the deed of Kolze, were subject and subsequent to the rights of the plaintiff as the owner of the notes and deeds signed by Day; that the property be sold and the defendants foreclosed of their equity of redemption.

Thereupon defendants appealed to this Court solely upon the question of jurisdiction.

Mr. Justice BROWN delivered the opinion of the Court.

The sole question presented by the record in this case is whether this is a suit to recover the contents of a chose in action, in favor of an assignee, which could not have been prosecuted if no assignment or transfer had been made.

By section 1 of the Act of August 13, 1888, it is provided that no Circuit nor District Court "shall have cognizance of any suit . . . to recover the contents of any promissory note or chose in action in favor of any assignee, or of any subsequent holder, . . . unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made." This language is taken from the original Judiciary Act of 1789, and has been in force, except for a few years, since the foundation of the Government.

In construing this clause the decisions of this Court have settled the following propositions:

1. That a suit to recover the *contents* of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract, or other chose in action. (*Serè* v. *Pitot*, 6 Cranch, 332; *Deshler* v. *Dodge*, 16 How. 622, 631; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Shoecraft* v. *Bloxham*, 124 U. S. 730.)

In *Corbin* v. *County of Blackhawk*, (105 U. S. 659,) a suit to compel the specific performance of a contract was held to be within the statute, Mr. Justice Blatchford observing (page 665): "The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents."

2. That a suit to foreclose a mortgage is within the inhibition of the act, and can only be maintained where the assignor was competent to file the bill. (*Sheldon* v. *Sill*, 8 How. 441; *Blacklock* v. *Small*, 127 U. S. 96.)

3. That the bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made. (*Turner* v. *Bank of North America*, 4 Dall. 8; *Mullan* v. *Torrance*, 9 Wheat. 537; *Bradley* v. *Ryan, Administrator*, 8 Wall. 398;

Anderson v. *Watt*, 138 U. S. 694, 702; *Robertson* v. *Cease*, 97 U. S. 649; *Brock* v. *Northwestern Fuel Co.*, 130 U. S. 341.)

4. That a suit may be maintained between the immediate parties to a promissory note as indorser and indorsee, provided the requisite diversity of citizenship appears as between them, or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract. In such case the original contract may be considered to ascertain the amount of the damages. (*Young* v. *Bryan*, 6 Wheat. 146; *Bank of United States* v. *Moss*, 6 How. 31; *City of Superior* v. *Ripley*, 130 U. S. 93; *Mullan* v. *Torrance*, 9 Wheat. 537; *Manufacturing Company* v. *Bradley*, 105 U. S. 175.)

This is primarily a suit to foreclose certain mortgages. Instead of setting up the mortgages, their maturity and non-payment, and their assignment to plaintiff, leaving to the defendants to plead the release by Stade of October, 1898, as an extinguishment of the mortgages, she has chosen to set forth the entire facts, to attack the release as fraudulent as against her, and to insist that the original notes and trust deeds are valid in her hands, and to pray for a foreclosure of the same.

The gravamen of the suit and the object to be attained are unaffected by the form of her bill. The suit is still in substance a suit to foreclose the trust deeds, and to remove the release as a cloud upon her title to them.

It may be that an action for fraud might have lain against the parties implicated, regardless of the citizenship of the parties from whom the plaintiff traced her title, or possibly a bill in equity to cancel the release deed of Stade and remove a cloud from the title. But where a bill is filed to foreclose a mortgage, and it appears by the bill itself that the mortgage has been fraudulently released to the mortgagor by a deed of which plaintiff had no notice, and the fraud is a mere incident, the bill is still one to recover the contents of a mortgage within the meaning of the act, and will not lie in a Federal Court unless the plaintiff's assignor might have maintained the bill, if no assignment or transfer had been made. It would advantage the plaintiff nothing to obtain a cancellation of the release without also foreclosing the mortgage in the same or a subsequent suit, while a right to foreclose the mortgage could not be established without incidentally avoiding the release.

In this aspect of the case it would seem to be immaterial whether the plaintiff derived her title directly from Stade, to whom she had advanced money and afterwards purchased the notes and trust deeds, as alleged in the bill, or through William P. Smith, who had obtained the notes and trust deeds from Stade, his debtor, since both Stade and Smith were citizens of the State of Illinois, and the inhibition of the statute would apply in either case.

The case of *Blacklock* v. *Small*, 127 U. S. 97, is similar, and we think practically decisive of the one under consideration. A suit was brought in the Circuit Court for South Carolina by two daughters of John F. Blacklock, who were citizens of Georgia, against certain defendants, who were citizens of South Carolina. It seems that Blacklock had sold a house and lot in Charleston to the defendant Small, who had given back a bond and mortgage to secure a portion of the purchase money; that Blacklock subsequently assigned the bond to Alexander Robinson in trust, for his (Blacklock's) children; that Small pretended to pay the bond by making payment to Robinson in Confederate treasury notes; that upon receipt thereof, Robinson satisfied the mortgage and delivered up the bond to Small; that Robinson, in receiving such payment, violated his duty, and was guilty of a breach of trust; that Small, in attempting to pay the debt in illegal currency, with full notice of the trust, had not paid the debt; that the satisfaction of the mortgage was void; that its lien was still subsisting, and that Small was still liable for the amount due upon the bond. It was held that, as the suit was one against Small, founded upon contract, namely, his bond and mortgage in favor of plaintiffs, who claimed only under the assignment made by their father, John F. Blacklock, to the defendant Robinson, such suit would not lie, inasmuch as plaintiff's assignor, John F. Blacklock, was a citizen of South Carolina and of the same State as Small. In answer to this it was insisted that the suit should not be considered as one founded upon the contract of Small, but as one for the delivery of the bond and mortgage by Small to the plaintiffs, founded on their wrongful detention, and that the foreclosure and sale of the premises prayed for was merely ancillary and incidental. The contention was held to be unsound, Mr. Justice Blatchford saying that the bill was clearly one for a decree for the amount of the bond and a sale of the mortgaged premises. In other words, the foreclosure and sale were treated as the main objects of the bill, and the breach of trust of Small as a mere incident. The cases of *Deshler* v. *Dodge*, (16 How. 622,) and *Bushnell* v. *Kennedy*, (9 Wall. 387,) were cited and distinguished.

By analogy to *Blacklock* v. *Small*, we think the gravamen of this case must be treated as the foreclosure of the trust deeds in question, and the prayer for a cancellation of the release given by Stade to Frederich Kolze as a mere clearing of the way to a decree establishing the title of the plaintiff to the notes and trust deeds. As the plaintiff is thus compelled to trace her title through Stade or Smith, who are both citizens of Illinois, and neither of whom could have prosecuted this suit, she is affected by the same incompetency.

The case of *Holmes* v. *Goldsmith*, (147 U. S. 150,) on which the plaintiff relies, is not in point. That was an action by a non-resident against the maker of a note, who had signed it entirely for the benefit of the payee,

with by an order. This therefore is not one of those irregularities that can be waived by taking a step in the cause, but an erroneous proceeding, contrary to the established course of the court, making the record imperfect, as in the instance of a bill or answer without the signature of counsel."

As a plea, under the rulings of this court, the plea filed by appellants could properly have been disregarded.

In *National Bank* v. *Insurance Co.*, 104 U. S., 54, this court say:

"It is also assigned for error that the appellee failed to set down for argument or traverse the pleas of the defendant, as required by the thirty-eighth equity rule; but the pleas in this case were irregularly filed and defective, under the thirty-first rule, for lack of the affidavit of the defendant that they were not interposed for delay, and of the certificate of counsel that they were, in his opinion, well founded in point of law, and may well have been disregarded on that account."

While the plea in this case might thus have been disregarded, such a practice under the rules seems a dangerous one.

Rule 33 provides that "the plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea," thus giving him but two alternatives; and Rule 38 provides: "If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose."

So that the only course apparently provided by the

rules for a plaintiff is to call up the plea and obtain a ruling thereon.

Smith is not mentioned in the bill of complaint or in the decree.

The allegations of the bill are that Kolze entrusted the notes "endorsed in blank, and being therefore negotiable by delivery, together with said trust deeds, now owned by your oratrix, to the said Charles E. Stade, *his trusted agent* in the premises, for safe keeping; and your oratrix shows that while the same were in the custody and keeping of the said Charles E. Stade, *as the agent* of the said Friedrich Kolze, but with all the indicia of ownership of the said securities, your oratrix, on or about the 17th day of February, A. D. 1898, advanced or secured to be advanced a large sum of money upon the note of said Charles E. Stade, secured to be paid by the pledge of the said nine principal notes and three trust deeds as collateral security therefor, and the said nine promissory notes and three trust deeds were then and there deposited by the said Charles E. Stade as such collateral security, and were relied upon by your oratrix as security for the sum of money advanced or secured to be advanced by your oratrix, as aforesaid; and your oratrix shows that the note of the said Charles E. Stade, to secure which the said nine promissory notes and three trust deeds were deposited, as aforesaid, was not paid in whole or in part, and said nine promissory notes and three trust deeds were thereafter sold, in accordance with the terms of the said collateral note, and were bid in and became and now are the property of your oratrix, and your oratrix is now the legal owner and holder thereof." (Rec., 11.)

The decree recites (Rec., 38) that the cause came on to be heard upon the report of William M. Booth, master in chancery, and the exceptions thereto, and that the court had heard arguments of counsel for the respective parties herein, and had fully considered the said master's report, and the exceptions thereto, and that the exceptions were overruled and the report approved; it then contains a finding that the material allegations in the amended bill of complaint contained, are true as therein stated.

Thus the bill traces the notes directly from Kolze, through Stade, his agent, to the appellee. The evidence proved this material allegation, as was evidently reported by the master and considered by the court, with all the facts before it, and as is found by the decree.

Appellants recognized that Smith did not figure in the question of want of diversity of citizenship presented by the record, as is shown by the language of their motion filed on January 14, 1904, in which Smith is not mentioned, and the claim is made that "it does not appear either from the original bills of complaint or from said amended bill of complaint, that the proper diversity of citizenship existed at the time of the commencement of the said suits, thereafter consolidated, between Friedrich Kolze, alleged in said amended bill of complaint to have been the original owner of the nine promissory notes and the three trust deeds securing the same, in said amended bill of complaint described, or said Charles E. Stade therein alleged to be his trusted agent in the premises, the assignors of said Charlotte E. Hoadley, complainant, and the defendants,

or any of them, so as to confer jurisdiction," etc. (Rec., 629.)

So, also, in their assignment of errors, appellants disregarded the allegations relating to Smith, in their plea, assigning as error denial of the motion to dismiss the amended bill "for want of jurisdiction because it did not appear that the proper diversity of citizenship existed at the time of the commencement of the said suits thereafter consolidated, between Friedrich Kolze or Charles E. Stade, alleged to be his agent, the assignors of said Charlotte E. Hoadley, complainant, and the defendants, or any of them, so as to confer jurisdiction," etc., and also in overruling the plea, "said plea being to the jurisdiction of said court *for the reason above stated.*"

But even if Stade had pledged the notes and trust deeds to Smith (which was not the fact and is not shown by the record), the title to the papers would not have passed to Smith, and would not have passed out of Kolze, the owner, until a valid sale under the collateral note.

The character and effect of a pledge is thus stated in Jones on Pledges and Collateral Security, 2d Ed., Sec. 7:

"A pledge differs from a mortgage of personal property in being a lien upon property and not a legal title to it; and the pledgee's especial property in the pledge is not enlarged by the pledgor's default in paying the debt, secured at its maturity. *The legal title to property pledged remains in the pledgor,* while a mortgage passes the legal title of the property itself to the mortgagee, subject to be revested in the mortgagor, upon the performance of an express condition subsequent."

who was really the party for whose use it was made. The maker and payee were citizens of the same State. The plaintiff, a *bona fide* holder, had paid full value for it to the payee, who had indorsed it to him. It was held the Court had jurisdiction; that evidence showing the real relation of the parties was admissible, and that the jurisdiction of the Circuit Court "was properly put by the Court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promissor, and did not, by his indorsement, assign or transfer any right of action held by him against the accommodation makers."

The decree of the Circuit Court is therefore reversed, and the case remanded to that Court with instructions to dismiss the bill.

True copy.

Test:

Clerk Supreme Court, U. S.